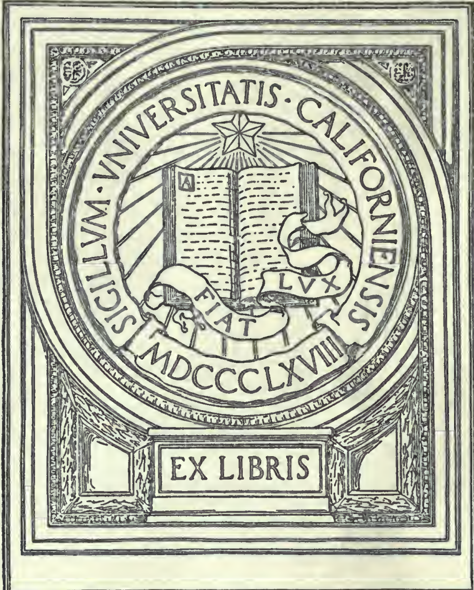
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LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT

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JOHNS HOPKINS UNIVERSITY STUDIES

IN

HISTORICAL AND POLITICAL SCIENCE

Under the Direction of the

Departments of History, Political Economy, and Political Science

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LEGISLATIVE AND JUDICIAL HISTORY

OF THE

FIFTEENTH AMENDMENT

BY

JOHN MABRY MATHEWS

Fellow in Political Science

BALTIMORE

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PREFACE.

This study is the outgrowth of a paper read in 1907 before the Political Science Seminary of the Johns Hopkins University. To Professor W. W. Willoughby, the director of the Seminary, the thanks of the author are due for helpful suggestions in the preparation of the work.

J. M. M.

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THE LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT.

CHAPTER I.

Preliminary Propositions.

The germ of the Fifteenth Amendment is contained in one of the plans considered by the Joint Committee on Reconstruction to remedy the alleged disparity in representative strength between North and South resulting from the emancipation of the negroes. The substance of this plan was so to amend the Constitution as to deprive the States of the power to disqualify politically on account of race or color. At the regular meeting of the committee, held January 20, 1866, the chairman of the Subcommittee on the Basis of Representation stated that the subcommittee had directed him to report for the action of the Joint Committee two alternative propositions for amending the Constitution. The first of these propositions, which had been drafted by Senator Fessenden of Maine, and proposed by him at the previous meeting of the subcommittee,[1] was couched in the following words: "All provisions in the Constitution or laws of any State whereby any distinction is made in political . . . rights or privileges on account of race . . . or color shall be inoperative and void."[2] The other proposition, of which James G. Blaine was the reputed author, provided that "whenever the elective franchise shall be denied or abridged on account of race . . . or color, all persons of such race

[1] Congressional Globe, 40th Cong., 3d sess., p. 1032.

[2] Journal of the Reconstruction Committee, p. 9. For earlier propositions from unauthoritative sources embodying the same principle, see Robert Dale Owen, Wrong of Slavery and Right of Emancipation, p. 197 (1864); and Worcester Speech of Charles Sumner, September 14, 1865, Works, Vol. IX, p. 473.

. . . or color shall be excluded from the basis of representation."[3]

The Fessenden plan, which involved the idea that finally took definite shape in the Fifteenth Amendment, was intended to secure the right of suffrage to the negroes by a direct guarantee. The Blaine plan, on the other hand, aimed at the same object by the indirectly coercive method of minatory inducements. The Joint Committee, after considering the merits of these two alternative propositions, decided by a vote of 11 to 3 to take the Blaine plan as the basis of action.[4]

Not only in the committee but also in open Congress was the project of immediate negro enfranchisement by means of a direct constitutional guarantee decisively voted down. The proposition of Senator Henderson, for example, providing that "no State, in prescribing the qualifications requisite for electors therein, shall discriminate against any person on account of color or race," was lost by a vote of 10 to 37.[5]

The opposition which was thus manifested in 1866 to measures embodying substantially the principle of the Fifteenth Amendment did not rest upon the supposed inapplicability of negro suffrage to the exigencies of the reconstruction problem. There was little real difference of opinion among the leaders in Congress as to the desirability of enlarging the sphere of political liberty for the negro race. The chief difficulty in accomplishing this result lay in the fact that is could apparently be done only by limiting the sphere of governmental action in all the States to a corresponding extent. There was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments.[6] This was a right of the States, declared Conkling of New York, to which they would long cling. It did not matter whether

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[3] Journal of the Reconstruction Committee, p. 9.

[4] Journal of the Reconstruction Committee, p. 10.

[5] Globe, 39th Cong., 1st sess., pp. 362, 1284.

[6] See remarks of Stevens of Pennsylvania, Globe, 39th Cong., 1st sess., p. 536; Wilson of Massachusetts, ibid., p. 1256; Banks of Massachusetts, ibid., p. 2532.

the innovation were attempted in behalf of the negro race or any other race; it was confronted by the genius of our institutions.[7] There was concrete evidence at hand that the States would hardly consent to surrender a power they had always exercised and to which they were attached.[8] Most of the Northern States did not allow negroes to vote, and some of them had repeatedly and lately pronounced against the practice.[9] In the decade immediately preceding 1867 numerous propositions involving impartial negro suffrage had been submitted to the popular decision in such States as New York, Connecticut, Ohio, Wisconsin, Minnesota, and Kansas, but they had been invariably voted down.[10]

It was in view of these circumstances that the Joint Committee on Reconstruction had come to the conclusion that three fourths of the States could not be induced to grant the right of suffrage, even in any degree or under any restriction, to the colored race.[11] There was no demand by either party that the local autonomy of the Northern States should be abridged by depriving them of the power to withhold suffrage from negroes,[12] yet this deprivation would be a necessary consequence of enacting a negro suffrage amendment to the Constitution. Thus at the outset was encountered the difficulty of dealing with a sectional problem by means of constitutional amendment, which, from its necessary generality in operation, is apt to produce undesigned results.

Since the objections to the immediate extension of suffrage to the negroes were too forcible to be overcome, an effort was made to secure for the race a prospective guarantee of this right. At the meeting of the Joint Committee, held on April 21, 1866, the following proposition was adopted by a vote of 8 to 4 and ordered to be reported to

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[7] Globe, 39th Cong., 1st sess., p. 358.

[8] Cf. Report of Joint Committee on Reconstruction, H. Rept. No. 30, 39th Cong., 1st sess., p. xiii.

[9] Globe, 39th Cong., 1st sess., p. 358.

[10] Cf. Braxton, The Fifteenth Amendment: An Account of its Enactment, p. 5.

[11] Howard of Michigan, Globe, 39th Cong., 1st sess., p. 2766.

[12] This was evidenced by the suffrage plank in the Republican platform of 1868. See McKee's National Platforms, p. 78.

Congress: "From and after the fourth day of July, 1876, no discrimination shall be made by any State, nor by the United States, as to the enjoyment by classes of persons of the right of suffrage, because of race, color, or previous condition of servitude."[13]

When this action of the committee became noised abroad, the Republicans in Congress from New York, Illinois, and Indiana held caucuses, and decided that negro suffrage in any shape ought not to form a part of the Republican programme in the approaching elections.[14] The opposition which thus developed was sufficiently formidable to cause the committee to recede from its position, and so, for the time being, a quietus was given to the demand for the extension to negroes of suffrage, whether immediate or prospective, by a direct constitutional guarantee.

Meanwhile the proposed Blaine amendment, which the Joint Committee had selected in preference to that drawn by Fessenden, was reported to Congress and passed by the House, but was killed in the Senate.[15] The opposition of the Senate forced the committee to modify its phraseology by omitting all direct reference to disfranchisement on account of race or color, and in this more general form it finally became a part of the Constitution as the second section of the Fourteenth Amendment. Although applying prima facie to the whole country, this section would in reality seriously affect only those States, principally in the South, having a large proportion of non-voting male citizens. It became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment. As far as subject-matter is concerned, it is really more germane to the Fifteenth Amendment than to the other sections of the Fourteenth Amendment.

The exact relation which this section of the Fourteenth

[13] Journal of the Reconstruction Committee, p. 24.
[14] Robert Dale Owen, "Political Results from the Varioloid," Atlantic Monthly, June, 1875, p. 666.
[15] Globe, 39th Cong., 1st sess., p. 1289.

Amendment bears to the Fifteenth Amendment, and the power which Congress has under it to reduce representation since the adoption of the latter, have been involved in some doubt. Congress has never exercised the power, and the courts have of course never passed upon the question. The statement has been recently made that "any attempt of Congress to exercise the power of reduction, when in fact the State has not discriminated against legal voters on account of race, would be unconstitutional, and as such would be promptly set aside by the courts . . . Congress no longer possesses the power to penalize States under the Fourteenth Amendment, for the penalizing clause was abrogated when the Fifteenth Amendment was adopted."[16]

The language of the penalizing clause lends, on its face, no support to this view. As we have seen, the opposition to its earlier form caused it to be generalized so as to apply to other forms of discrimination than those based on race or color. It was certainly realized at the time of the adoption of the clause that it was in terms broad enough to apply to discrimination on any grounds except sex, minority, rebellion, and crime.[17] The Committee on the Ninth Census even took steps to ascertain the number and extent of the various grounds on which persons were disfranchised in the States, in order to form a basis for the next decennial apportionment act, which was to be passed in conformity with the second section of the Fourteenth Amendment.[18]

Although the language of the penalizing clause was thus early perceived to be broad enough to apply to disfranchisement on grounds other than race or color, yet the object which the framers aimed at in proposing it, and without which it would not have been even suggested, was the penalization of a State for discriminating against persons on the grounds later prohibited by the Fifteenth Amendment. If

[16] Charles A. Gardiner, "Solution of the Negro Problem," New York University Convocation Address, 1903, p. 210.

[17] See remarks of Howard of Michigan, Globe, 39th Cong., 1st sess., p. 2767; and Haldeman of Pennsylvania, Globe, 41st Cong., 2d sess., p. 40.

[18] H. Rept. No. 3, 41st Cong., 2d sess.

it be admitted that cases involving the penalizing clause could be adjudicated in the courts, and that the clause could be so narrowed by construction as to apply only to the grounds of disfranchisement which the Fifteenth Amendment interdicts, then the two provisions would represent merely different methods of dealing with the same subject-matter. Now, the sense of the nation upon a particular subject of general interest is normally in a state of flux, and if, at two distinct stages in the evolution of public opinion, the sense of the nation upon that subject is crystallized into a part of the organic law, the opinion rendered at the second stage would seem to supersede that rendered at the first. Hence, according to this view, the penalizing clause was a preliminary or tentative form of the Fifteenth Amendment, and when the latter was adopted the preliminary arrangement was discarded like the scaffolding of a finished building.

The fallacy in this view lies in the supposition that the courts would confine the application of the penalizing clause to the grounds of discrimination prohibited by the Fifteenth Amendment. If the decisions of the Supreme Court bearing on the reconstruction amendments can be taken as indicating their probable attitude toward the penalizing clause, it is reasonably certain that they would not restrict the operation of the clause to the object which Congress had in view in proposing it if its language plainly and unambiguously covers a wider field. It is true that the court has at times given some color to the view that these amendments must be treated historically,[19] but this ruling has not been adhered to.[20] In regard to the Thirteenth Amendment the court has declared that the slavery or involuntary servitude of the Chinese, Italian, or Anglo-Saxon race is as much within its compass as that of the African.[21] If this is so, then by analogy the exclusion of paupers, illiterates, or idiots from the suffrage would subject a State to liability of loss of representation. Hence, whenever a State withholds the elective

[19] Slaughter House Cases, 16 Wall. 36.
[20] Holden vs. Hardy, 169 U. S. 366.
[21] Hodges vs. United States, 203 U. S. 1.

franchise from persons on any grounds except those allowed by the penalizing clause or prohibited by the Fifteenth Amendment, Congress possesses the constitutional power to reduce the representation of such State in the proportion which the number of persons so disfranchised bears to the whole number of adult male citizens in said State.

The extension of suffrage to negroes in 1866 by a direct constitutional guarantee was prevented, as we have seen, by the opposition to such a measure encountered in the Northern States. The numerous elections in those States at which propositions involving colored suffrage were voted down showed that the right of the negroes to vote was not generally considered at the North as a good per se, for this would logically have required that it be introduced into the North as well as into the South. It was considered rather as a means toward the accomplishment of certain definite ends incident to the reconstruction of the Southern States, and as such it should properly be confined to that section of the country.[22] So long as the majority of the people in the Northern States maintained this attitude with sufficient firmness to determine the policy of their local and national representatives, the most effectual mode of securing negro suffrage at the South, to wit, by a constitutional amendment, could not be adopted. If it had been possible to propose an amendment similar in principle to the Fifteenth Amendment which could be made to apply only to the Southern States, there is little doubt that it would have been done in 1866. It was this very anomaly, however, which Congress later attempted, in effect, to enact.

Since the attitude of the North made a constitutional amendment impracticable, Congress determined to effect the same object, as far as the South was concerned, through its own enactments. Beginning with the Act of March 2, 1867,[23] the national legislature endeavored by every means in its power to make negro suffrage in the South as perma-

[22] Cf. Blaine, Twenty Years of Congress, Vol. II, p. 388.
[23] 14 Stat. at Large, 428.

nent as a constitutional amendment would make it, without in any way affecting the control of the Northern States over the qualifications of their voters. The state constitutions framed in accordance with the provisions of this act were required to establish universal manhood suffrage for negroes before they would be recognized by Congress. It was supposed that no change could afterwards be made in the suffrage provisions of these constitutions unless the proposed change were referred to the electorate established by the existing constitutions. This would seem to have made it difficult in most of these States to change the constitutions so as to disfranchise negroes. Yet this was not deemed a sufficient safeguard. By the Acts of June 22–25, 1868, seven of these States were admitted to representation upon the fundamental condition that the constitutions of none of them should ever be so altered as to deprive the enfranchised negroes of the right to vote.[24]

If such a condition was what it purported to be, namely, a fundamental and unchangeable part of the organic laws of those States, its effect would obviously be to secure all that a negro suffrage amendment to the Constitution could secure as far as the South was concerned, while leaving undisturbed the local autonomy of the Northern States. It would thus be equivalent to a constitutional amendment enacted into law by a simple act of Congress and having binding force on some States and not on others. If there had been no doubt as to the validity and unalterable character of such a condition, it would have made the Fifteenth Amendment to a large extent unnecessary. The fear was freely expressed, however, that the theory of the equality of the States was too deeply rooted in our constitutional system ever to make the observance of such a condition practically enforceable.[25] The prospective collapse of the muniments of negro suffrage set up by Congress at the South indicated that unless the

[24] 15 Stat. at Large, 72–4.
[25] See remarks of Bingham of Ohio, Globe, 40th Cong., 2d sess., p. 2211; and of Conkling of New York, ibid., p. 2666.

results of the reconstruction process were to be overturned, resort must be had to some more effectual and permanent method of securing the right of the negroes to vote. This condition of affairs cleared the way for the proposal of the Fifteenth Amendment.

CHAPTER II.

THE FORMATION OF THE AMENDMENT.

No concerted movement was made toward proposing the Fifteenth Amendment until after the presidential election of 1868, and the merits of such a measure were not involved in the issues of the presidential campaign.[1] Four days after the election, however, the Washington correspondents of the New York dailies telegraphed, on the strength of information derived from a "Radical Senator," that a suffrage amendment to the Constitution would be introduced into both houses upon the reassembling of Congress in December.[2] On the same day, Wendell Phillips issued a pronunciamento to the effect that the measure of primary importance to be at once initiated was an additional amendment to the Constitution forbidding disfranchisement, or proscription from official trust, on account of race or color, in any State or Territory of the Union.[3]

Now that most of the ex-Confederate States had been in large measure rehabilitated, it was realized that the practically complete control which Congress had exercised over them was gradually slipping away and must eventually come to an end. When this should happen, the only remaining security for negro suffrage in the South lay in the extent to which fundamental conditions of readmission had rendered the reconstruction constitutions unalterable in respect to suffrage. Confidence in the validity of these conditions was now perceptibly on the wane. Moreover, the attitude of the Southern whites left no doubt that, if these conditions should

[1] A search through the editorials and news columns of the leading newspapers of the country issued during the presidential campaign of 1868 fails to reveal a single direct reference to any proposed fifteenth amendment.

[2] See, e. g., New York World, November 8, 1868.

[3] Anti-Slavery Standard, November 7, 1868.

be adjudged invalid and no additional warrant should exist for the further interference of Congress in the Southern States, negro suffrage would be doomed. This condition of affairs emphasized the need of supplying a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution which should contain the authorization to Congress to enforce its provisions.[4]

The above consideration was the controlling motive which led to the enactment of the Fifteenth Amendment, but there were other influences leading toward the passage of a constitutional amendment on the general subject of suffrage. There was a widespread nationalistic feeling that, irrespective of the Southern situation, the general Government ought to be given further control of the suffrage conditions in the States. This, it was thought, would inure to the benefit both of the Government and of the individual.

From the standpoint of the Government the argument was put forth that no opportunity had ever been offered so auspicious as that which then existed for authorizing the nation itself to determine who should share in its government. If there was no nation, except in a vague and formal way, then each State must be left to determine for itself whom it would authorize to take part for it in the general deliberations. But if there was a nation, then the nation ought to determine the matter for itself by means of a constitutional amendment.[5]

From the standpoint of the individual the desire for change centered around the demand for the nationalization of political liberty. The spirit of our institutions required that every free American citizen should exercise equal political rights. There was a widely held belief that universal suffrage is the perfect antidote against all the

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[4] Cf. editorial in New York Tribune, December 1, 1868.

[5] Harper's Weekly, November 28, 1868, p. 754. Editorial written presumably by George W. Curtis.

moral and political ills to which society is subject.[6] No reliance could be placed upon the States to secure universal equality in political rights, and this task must consequently be intrusted to the nation.

The groups of men favoring a suffrage amendment of some kind were, therefore, the politicians,[7] who aimed at congressional control over Southern elections, the nationalists, who desired a strong central government, and the universal suffragists, or humanitarians, as they may be called, who were laboring to base the enjoyment of political rights upon no distinction less comprehensive than humanity itself. Over against all three of these, and opposed to a suffrage amendment of any kind, were the local autonomists, proud of local tradition and jealous of national interference in local concerns.

Thus we have four distinguishable elements in the situation, three desiring a change, the fourth conservative if not reactionary. The politician, the nationalist, and the universal suffragist agreed in desiring a stronger central government, but for different reasons. The nationalist alone favored centralization as an end in itself. With the politician and the universal suffragist, this was incidental to control over the conditions of suffrage. The universal suffragist favored a broad, comprehensive amendment, while the politician preferred to confine it strictly to the matter of greatest political interest, to wit, negro suffrage. The politician was the initiator and real engineer of the movement, and without him it is probable that nothing could have been done. The New York Tribune, the leading Republican newspaper in the country, called upon the managers of the Amendment to make it broad enough to enfranchise all who were then disfranchised, adding that, if they launched "a onesided and partisan measure, look-

[6] Cf. editorial in the Nation, August 13, 1868.

[7] The word politician is here used, not in any opprobrious sense, but as describing men who had no particular theories as to the nature of government or the rights of man, but who were laboring for a certain, concrete object, fraught with definite, practical results.

ing to the enfranchisement of the Blacks alone," it would encounter a resistance too formidable to be overcome.[8] How far the politician could be induced to broaden the Amendment in deference to the views of the universal suffragists, or humanitarians, in his own party, would largely depend on the extent to which he was able to control the situation without their direct assistance. The Fifteenth Amendment was to emerge from the struggle of these four partly cooperating, partly opposing influences, its character determined through the process of equilibration between the diverse forces.

The debates in Congress over the proposed suffrage amendment centered around the forms reported to their respective houses by the Senate and House Judiciary Committees. The House committee directed their attention to remedying the evil of which the principal complaint was made, viz., that in some States men were deprived of the privilege of voting on account of their race, color, or previous condition, and on January 11, 1869, they reported a joint resolution proposing to amend the Constitution, the first section of which was as follows: "The right of any citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States."[9]

This proposition was not sufficiently broad to meet the views of the universal suffragists. On January 25 the entire Ohio delegation in the House held a caucus at which the decision was reached to throw the weight of the delegation toward the adoption of a universal suffrage amendment to the Constitution.[10] This delegation became the nucleus of the forces in the House which were endeavoring to secure a broader amendment than the Judiciary Committee had reported. The form of amendment which they

[8] November 13, 1868. Editorial under the caption, "Nationalizing the Right of Suffrage."
[9] Globe, 40th Cong., 3d sess., p. 286.
[10] Washington dispatch to Baltimore American, January 26, 1869.

desired to have substituted for the committee report was one prohibiting any State from denying to any citizen of the United States legally residing in that State the right to vote at any election except on the grounds of sex, minority, insanity, crime, and rebellion.[11] This would have meant, at least in the North, practically universal manhood suffrage. It was advocated on the ground that unless the amendment were made broad the time would come when it would have to be looked into and repaired.[12] The language should be made sufficiently comprehensive not to require amending again when, in a short time, some other injustice, not based on race, color, or previous condition, should grow up among the people.[13]

The argument was put forth, moreover, that colored persons ought not to be set above every other class of citizens in America by amending the Constitution exclusively in their interest to the neglect of equal protection of white citizens. An amendment like that reported by the committee would sweep away that equality of the law upon which American institutions were founded.[14] The claim was made that a universal suffrage amendment would form the capstone in the great temple of American freedom, would consummate the important work of regenerating the country, and would assure the peace and prosperity of the whole nation.[15]

It was pointed out, however, that both the amendment reported by the committee and that advocated by the universal suffragists deferred to some extent to the states' rights sentiment of the local autonomists, and were therefore defective from the nationalistic standpoint. Both of them circumscribed the control of the States over the subject, but did not define the right of suffrage affirmatively. The ultranationalists argued that the whole plan of attempting to impose limitations upon state authority in relation

[11] Globe, 40th Cong., 3d sess., p. 638.
[12] Ibid., Appendix, p. 130.
[13] Cullom of Illinois, Globe, 40th Cong., 3d sess., p. 652.
[14] Bingham of Ohio, ibid., p. 1427.
[15] Ward of New York, Globe, 40th Cong., 3d sess., p. 24.

to suffrage would prove inadequate. There was no correct mode except for the National Government to take under its protection the whole subject of citizenship and suffrage by means of a constitutional amendment declaring the right of every sane adult male citizen of the Republic, not guilty of infamous crime, forever to enjoy the right to vote for every officer to be elected under the state or national governments.[16] The most elementary principles of government and the plainest dictates of logic required that the Amendment should embody a "Federal definition of Federal electorship."[17]

Opposed to the contentions of the universal suffragists and the nationalists was the argument, based on expediency and deference to states' rights, that a broad proposition would array against itself so many peculiarities of the various States that it could not be ratified. To this argument the politicians also lent their support, alleging that if the Amendment were confined to remedying the one great and crying evil of race disfranchisement it would be stronger before the people.[18] A number of preliminary votes taken showed that the latitudinarians were able to muster only about one third of the House, and finally, on January 30, the amendment as reported by the Judiciary Committee was passed by a vote of 150 to 42.[19]

In the meantime, on January 15, the Judiciary Committee of the Senate had reported to that body a proposed amendment, the first section of which was as follows: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude."[20]

This proposition was attacked by the universal suffragists, or humanitarians, in the Senate on the ground that if

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[16] Globe, 40th Cong., 3d sess., p. 1226.

[17] Shellabarger of Ohio, Globe, 40th Cong., 3d sess., Appendix, p. 98.

[18] Boutwell and Butler of Massachusetts, Globe, 40th Cong., 3d sess., pp. 725–7.

[19] House Journal, 40th Cong., 3d sess., p. 237.

[20] Globe, 40th Cong., 3d sess., p. 379.

the national will was to be invoked for amending the Constitution, it should be done in the name of humanity, not of a race. There was no source from which any class could derive the right to monopolize the elective franchise.[21] It was futile to resist the overwhelming current of public opinion and the irresistible drift of modern civilization toward the great characteristic of the age—universal suffrage.[22] In no way could individual liberty be so fully secured and the harmonious working of all the elements of our politics and society be so effectually sustained as by the establishment of universal suffrage in its broadest and completest sense. If it were admitted that any might be shut out from equal political rights, then by parity of reasoning all might be shut out, and monarchy would be the result.[23] Moreover, the logic of the American form of government led inevitably to universal and impartial suffrage. The government was based upon the theory that the sovereign power belongs to all the people. Since the right of self-government is inherent in manhood, each individual should have an equal share of political power.[24] Hence, the law of the Constitution should clearly define the power that all citizens should have in their own hands to maintain and defend those inherent rights to preserve which governments were ordained among men.[25]

The humanitarian principle here appeared as an offshoot of the old doctrine of inalienable, natural rights, like the fossil of a former mould of thought still embedded in the popular mind. The logical limit of their theory was that the right to vote inhered in every human being. In practice, however, they conceded that this was an unattainable ideal, for they admitted the necessity of qualifications as to age and residence. They explained these exceptions,

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[21] Globe, 40th Cong., 3d sess., p. 710.
[22] Ibid., pp. 709, 862, 981.
[23] Ibid., pp. 982–3.
[24] Ibid., p. 861.
[25] Globe, 40th Cong., 3d sess., p. 710. To carry out these views to their logical conclusion would require that women also be admitted to the suffrage, but at this result most of the humanitarians balked.

however, on the ground that, although a person were not authorized for the time being to exercise the right of suffrage, yet the right in some mysterious way still inhered in him. "Dormitur aliquando jus, sed moritur nunquam." But the practical answer to this was, of course, that until he were authorized to exercise the right, he had, in the view of the law, no right at all. So that however undisputed the right might be in the realms of ideality, as soon as it was admitted that exceptions might be made the whole theory practically broke down.

In opposition to the views of the humanitarians the point was made that practical experience in France and elsewhere had demonstrated that universal suffrage gives no security for the preservation of civil liberty. The legitimate object of all government, it was conceded, is the greatest good of the whole people, but it did not follow that this object could be attained by vesting political power in every member of the community. The basis of all government was admitted to be the consent of the governed, and the powers of government are therefore intrusted, most safely for the benefit of all, to the people at large. But this, like all general propositions, was subject to exceptions, and was dependent for its practical application upon the condition of the community to which it is applied.[26]

From the nationalistic point of view, attention was called to a strange anomaly which existed in the Constitution of the United States. While to all other properly constituted governments in the world belonged the faculty of prescribing the qualifications of voters, it was a very singular fact that no such faculty pertained to the Government of the United States. In this respect the general Government was subject entirely to the action of the States. This was anomalous because the power to regulate suffrage ought to belong to the government which is to be affected by it.[27]

The determination of this question was alleged to be

[26] Globe, 40th Cong., 3d sess., p. 1012, and Appendix, p. 165. Cf. also editorial in New York World, November 14, 1868, p. 6.
[27] Globe, 40th Cong., 3d sess., p. 985.

really dependent upon the further question as to whether the federal or the state government was sovereign. To allow States to determine who of the citizens of the United States should exercise political power would be yielding to them the most essential and vital attribute of sovereignty.[28] Not only because the United States was sovereign, but also in order that it might remain so, was it important that it should have the power of creating voters. The possession of this power would enable the central Government to stand as the champion of the individual and to enforce the guarantees of the Constitution against the so-called sovereignty of the States. Unless that power be enforced by the central Government, that Government would fail of the object of its institution, and would be subject to encroachment by the States; for, when government fails to protect the individual in any of his rights, it forfeits to the degree of that failure its claim upon his allegiance and support.[29]

The last mentioned statement indicates the connection between the views of the nationalists and those of the humanitarians. Strictly speaking, it would seem to be immaterial from the nationalistic point of view whether suffrage were restricted or enlarged, but in practice it was intimated that the national consciousness would receive its greatest stimulus and the power of the National Government would consequently rise to its greatest height only when the nation should directly assert its power and give to every citizen the right to vote.

In order to effect this object the opinion was expressed that no mere prohibition on the States would be sufficient. There ought to be placed in the Constitution a grand affirmative proposition containing a national guarantee of the right of suffrage. In pursuance of this design, and as embodying the views of both the nationalists and the humanitarians, the following substitute was offered for the first section of the amendment proposed by the Judiciary Committee: "All male citizens of the United States, residents of

[28] Globe, 40th Cong., 3d sess., p. 862.
[29] Globe, 40th Cong., 3d sess., p. 984.

the several States . . . , of the age of twenty-one years and upward, shall be entitled to an equal vote in all elections in the State wherein they shall reside; the period of such residence as a qualification for voting to be decided by each State, except such citizens as shall engage in rebellion, or be convicted of infamous crime." This proposition was lost by a vote of 9 to 35.[30]

Some of the nationalists were opposed to placing in the Constitution an inflexible provision on the subject of suffrage, for, they argued, unless made in strict harmony with the spirit and genius of our institutions, it would, from the difficulty of repealing it, produce a tendency toward revolution.[31] The nation ought not to bind itself hand and foot for all coming time to any one rule on the subject, and, in order to avoid this difficulty, the following form of amendment was offered: "Congress shall have power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State."[32]

This proposition was based upon the theory that law is an organic growth, changing with the shifting conditions of time and place, and therefore it ought not to be petrified into an arbitrary rule, invariable in its application to every locality and to every period of time. The war and its consequences had brought the negro into overshadowing prominence, but the feeling was expressed that, in amending the Constitution, the possibilities of the future ought to be taken into consideration. There ought to be some way of providing against contingencies which might arise other than by the cumbrous method of constitutional amendment.[33]

Although this form of amendment possessed to a certain extent the advantages of elasticity and adaptability to time and condition, yet it was flexible in only one direction. Under it Congress might enlarge the area of suffrage to any

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[30] Senate Journal, 40th Cong., 3d sess., p. 226.

[31] Globe, 40th Cong., 3d sess., p. 670. An element here overlooked was the potent agency of the courts in depriving constitutional provisions of their rigidity, and in moulding them by construction into harmony with our institutions.

[32] Globe, 40th Cong., 3d sess., p. 226.

[33] Globe, 40th Cong., 3d sess., p. 901.

extent, but would be incapable of placing any restrictions upon an unduly expanded electorate. Its chief defect was, however, that it laid the subject open to too many changes, dependent upon the political complexion of the majority in Congress. It was lost by a vote of 6 to 38.[34]

The defeat of both of the nationalistic propositions seemed to indicate that those who desired such an amendment would not be able to impress their views upon its final form. The difficulties in the way of such a proposition were very great. Those who argued that since all the other well-constituted governments had the power to make their own voters, therefore ours ought to have it, overlooked the fact that the difference between our form of government and that of other countries might make a different rule of suffrage not only proper but necessary. A uniform rule of suffrage was not likely to be equally adapted to all parts of a federal republic varying greatly as to local conditions. The reasons which had brought the Convention of 1787 to the conclusion that a uniform rule was impracticable still carried weight in 1869, in spite of the growth of national consciousness.[35] The States were still considered by many the best judges of the circumstances and temper of their own people. It was feared by some that reaction from the extreme states' rights doctrines of secession might go to as dangerous an extreme on the other side.[36] The apprehension was felt that when the thirty-seven distinct bodies of voters should have been melted down into one common mass, deriving their right to vote from the central authority, a monarchy could then be established by a simple and direct process.[37] An argument was put forth to show that the Federal Government ought to be restricted to those delegated powers which are necessary and proper to effect the objects for which it was organized. Among these objects neither uniformity nor universality of suffrage was contemplated.[38]

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[34] Globe, 40th Cong., 3d sess., p. 999.
[35] Cf. Elliott's Debates, Vol. V, pp. 385–8.
[36] Globe, 40th Cong., 3d sess., p. 859.
[37] New York World, November 14, 1868, p. 6.
[38] Globe, 40th Cong., 3d sess., Appendix, p. 166.

The best conceived attack made by the local autonomists upon the project for a national suffrage amendment was based upon the nature of law in general and its relation to public opinion. It was a timely protest against the exaggerated confidence which was then widely entertained in the power and efficiency of a legislative fiat to change conditions and eradicate so-called popular prejudices. This, it was pointed out, was the reverse of the true law-making process. Organized society ought not to stand in loco parentis over the individual. The consent of the individual must not be anticipated or presupposed, enacted into law, and then enforced. It was not in the nature of human society to advance the popular operation of institutions out of harmony with the voice of the people. The limitations of written law were obvious, but there was no reversing a principle when it had become one of the unwritten laws of the social constitution. When the public mind had arrived at the recognition of a principle, it at once became the law of society. The decision of the popular mind was far stronger than a constitutional amendment, and could alone give it vitality.[39]

From these considerations conclusions were deduced in harmony with the position of the local autonomists. The declaration was made that before any amendment was proposed there ought to be a general expression of the will of the people favorable to it in the suffrage provisions of the various state constitutions. When reformations come from the individual through the State to the general Government, they are likely to become salutary and permanent. If, on the contrary, they begin with the Government and are extended by the authority of the nation over the individual, they reverse the true order of reform. The action of Congress ought not to be the initiation but the termination of

[39] Globe, 40th Cong., 3d sess., Appendix, pp. 194–5. It should be noted that this view, if carried to its logical conclusion, would preclude all enacted law as useless and unnecessary. It overlooked the power of the law to eliminate generally condemned evils, and to bring backward elements in the body politic up to the general level of social advancement.

the process. If the measure was not clearly the will of the people, it ought not to be forced upon them. If it was clearly the will of the people, it would at once pass into the state constitutions, and thus render entirely unnecessary any national provision on the subject.[40]

Opposed in many respects to all three of the other factions, but especially to the local autonomists, were the politicians, who were laboring for the accomplishment of one specific object, namely, the practical enforcement of the right of the negro to vote. They deprecated the complication of this definite issue by the introduction of irrelevant matters. The ponderous machinery of constitution-amending ought not to be set in motion for the purpose of remedying non-existent and imaginary evils, but the change in the law should reach only so far as the evil complained of extended, and should not project beyond that into theoretical amendments.[41] In order to confine the matter to this particular object, Howard of Michigan moved to substitute the following words for the first section of the amendment proposed by the Judiciary Committee: "Citizens of the United States of African descent shall have the same right to vote and hold office as other citizens."[42]

In urging this amendment, Howard said: "Why not come out plainly and frankly to the world and say what we mean, and not endeavor to darken counsel with words without knowledge, by circumlocution, by concealing or endeavoring to conceal, the real thing which we aim at? Give us, then, the colored man, for that and that only is the object that is now before us. The sole object of this whole proceeding is to impart by a constitutional amendment to the colored man the ordinary right of citizens of the United States."[43]

The form of amendment proposed by Howard met the approval not only of those who desired an affirmative proposition referring to the Africans alone, but also of the sena-

[40] Globe, 40th Cong., 3d sess., Appendix, pp. 195–6.
[41] Globe, 40th Cong., 3d sess., pp. 1008, 1309.
[42] Globe, 40th Cong., 3d sess., p. 828.
[43] Globe, 40th Cong., 3d sess., p. 985.

tors from the Pacific Coast, since it eliminated the awkward complication of Chinese suffrage, which might be involved in the amendment proposed by the committee.[44] On the other hand, it met strong opposition from those who were willing to support a suffrage amendment, but thought it unwise to confine it to one race. They declared that if the question were important enough for the national will to be invoked in adjusting the fundamental law, it was an outrage upon the good sense of a country, made up of the descendants of all nations, to impose upon it an amendment of that kind.[45] The opposition to the Howard amendment was too great to be overcome, and it was lost by a vote of 16 to 35.[46]

Thus the forces of the humanitarians, the nationalists, the local autonomists, and the politicians stood out against each other, none completely master of the situation, none fully able to impress their peculiar views upon the form of the amendment. This deadlock was temporarily broken by an unpremeditated coalition between the humanitarians and the politicians. An intimation was thrown out by the humanitarians that they would be content with a prohibition upon the States against the imposition of the five principal tests by which persons were or had been excluded from the suffrage in this and other countries, viz., race, poverty, religion, nativity, and illiteracy.[47] At the same time the politicians were becoming uneasy for fear that, if the committee amendment, which prohibited discrimination only on grounds of race, color, and previous condition, should be adopted, the Southern States might still be able to disfranchise most of the negroes by the imposition of educational and property tests.[48] Hence, the politicians assumed the role of quasi-humanitarians and, in combination with the humanitarians proper, carried through the Senate, by a vote of 31 to 27, an

[44] Ibid., pp. 863, 1008, 1309.
[45] Ibid., pp. 1008–13.
[46] Senate Journal, 40th Cong., 3d sess., p. 222.
[47] Globe, 40th Cong., 3d sess., p. 1013.
[48] See Washington dispatch to Baltimore Sun, February 5, 1869; and cf. Harper's Weekly, February 27, 1869, p. 131.

amendment prohibiting the imposition of tests on the grounds of "race, color, nativity, property, education, or creed."[49]

This action of the Senate aroused a storm of protest throughout the country, especially in regard to the prohibition of educational tests.[50] The amendment was rejected by the House, and there ensued between the two houses a wrangle in which the instability of the coalition between the humanitarians and the quasi-humanitarians was shown by the action of the Senate in deserting the coalition amendment, and then passing a resolution similar to the final form of the Amendment, except that it was designed to guarantee the right to hold office as well as the right to vote.[51] With exasperating variability, the House in turn disagreed, and the differences between the two branches had to be submitted to committees of conference, who reported an amendment in the exact form which it finally assumed. Their report was immediately agreed to in the House by a vote of 144 to 44,[52] but was violently attacked by many senators, who were incensed at the action of the committees in omitting the words "hold office." The consideration, however, that this was probably the best form obtainable, and that a refusal to accept it would endanger the success of the whole measure,[53] finally rallied to its support the various factions who favored a suffrage amendment of some kind, and on February 26, 1869, it was agreed to by a vote of 39 to 13.[54]

Thus the Fifteenth Amendment passed Congress after a struggle which finally resulted in the agreement of diverse

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[49] Senate Journal, 40th Cong., 3d sess., p. 227.

[50] See, for example, editorial in the New York Times, February 15, 1869; The Nation, February 18, 1869, p. 126; Harper's Weekly, February 27, 1869, p. 131; and Wendell Phillips in Anti-Slavery Standard, February 20, 1869.

[51] Senate Journal, 40th Cong., 3d sess., p. 293.

[52] House Journal, 40th Cong., 3d sess., p. 449.

[53] Globe, 40th Cong., 3d sess., pp. 1626–9.

[54] Senate Journal, 40th Cong., 3d sess., p. 361. As finally passed it was in the following form:—

"Sect. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Sect. 2. The Congress shall have power to enforce this article by appropriate legislation."

forces upon a compromise. These forces were primarily principles, rather than men or groups of men. They were not always separable except in thought, for the same senator or representative was often influenced by more than one of them at the same time. The ideal of the humanitarian principle was the investment of all human beings with political rights. From this point of view, the location of the power to make voters, whether in the States or in the general Government, was immaterial. The humanitarian principle, in fact, logically required the enlargement of the sphere of individual liberty at the expense of both the state and the general government. The ideal of the nationalistic principle was the complete control of the suffrage by the National Government. From this point of view it was, strictly speaking, a matter of indifference whether the right to vote was vested in all human beings or restricted to a few. The local autonomic principle was diametrically opposed to the nationalistic principle, in that it required the retention by the States of full power over the suffrage; but here, also, the extension or the restriction of the area of suffrage was non-essential. These three views rested upon well defined theories, and those who held them were, in a certain sense, doctrinaires. The fourth view, that of the politicians, which looked forward to the definite, concrete object of negro enfranchisement, was based upon no general theory of government or of human rights, except in so far as it was affected with a quasi-humanitarianism.

If, in the light of these distinctions, we examine the Amendment, as finally passed, we find that it is a compromise between the four forces, in which each has gained something and conceded something. In so far as the Amendment failed to enfranchise everybody, it fell short from the humanitarian point of view. The fact, however, that it prohibited discrimination on grounds which in this country had operated to exclude a greater number of persons from the polls than all others combined was a long stride toward the humanitarian ideal. From the standpoint of government, as distinguished from liberty, the Amendment de-

prived both the National Government and the state governments of a certain amount of power over the suffrage which they had previously possessed. In this respect, therefore, the Amendment represented a breaking away from both the local autonomic and the nationalistic principles. The fact, however, that the national legislature was authorized to enforce the prohibition upon the States carried the national power over suffrage into a sphere whither it had not previously extended. In an absolute sense, the Amendment was an entire loss from the states' rights point of view. Yet the impress of the local autonomic principle upon the Amendment is seen in the fact that it does not disturb the source of voter-making power in the States, and does not diminish that power except in certain express particulars. From the standpoint of the politician, the Amendment was a very considerable gain, inasmuch as it prohibited the three most obvious and easily administered tests by which the negro might be excluded from the suffrage. It was not entirely satisfactory to the politician, however, because it did not directly and specifically guarantee the African's right to vote. As between the doctrinaires on the one hand and the practical politicians on the other, the Amendment was also a compromise. Of the three grounds of discrimination prohibited by the Amendment, two—race and color—are of general application, while the other—previous condition of servitude—is in this country applicable to the negro alone. The Amendment, therefore, contains a specific reference to the negro, while, at the same time, it rests to a certain extent upon a general principle.[55]

[55] In tracing the formation of the Amendment we have not noticed the second section, inasmuch as there was never any difference of opinion among the friends of the measure, either as to the desirability of including it in the Amendment or as to the form which it should assume.

CHAPTER III.

Contemporary Congressional Interpretation.

Having traced the process by which the Amendment reached its final form, we now proceed to inquire what effect and legal intendment Congress attached to the particular phraseology of the Amendment as finally passed, and what results were expected to flow from its adoption.

The peculiar abruptness with which the Amendment brings into the foreground the words "The right of citizens . . . to vote" was strongly objected to by those who did not wish even indirectly to indicate that any one had the right to vote until the law gave him that right. The language was thought to imply that there was a right of suffrage which inhered in the citizen as a mere natural right independently of any constitutional or legal grant to that effect.[1] Others thought it desirable that the Amendment should imply the inherent right of the citizen to vote. There ought to be some substantial foundation upon which the right of suffrage should rest, and the Amendment, it was said, very correctly made this basis citizenship.[2] The implication of a preexistent, duly qualified electorate was allowed to remain in the Amendment, probably in deference to the views of those who thought that the right to vote was among the privileges and immunities protected by the Fourteenth Amendment.[3] This implication has given some color to the view that the prohibition which the Amendment lays upon the States cannot be regarded as a limitation

[1] Drake of Missouri, Globe, 40th Cong., 3d sess., pp. 999–1000.

[2] Fowler of Tennessee, Globe, 40th Cong., 3d sess., p. 1303.

[3] The practical object in view in confining the protection of the right to vote to citizens was probably to allow the States to discriminate against unnaturalized persons. This would exclude the Chinese for the time being, but a bill was then pending to strike the word "white" from the naturalization laws. See Globe, 40th Cong., 3d sess., p. 1030.

upon the mode in which the States shall exercise the power to grant the right to vote in the first instance, but must be construed merely as a restriction on their power to revoke such grant in a discriminatory way.[4]

It will be noticed that the Amendment fails to specify the character of the elections at which the right in question is to be exercised. The second section of the Fourteenth Amendment was at one stage in its formation similarly indefinite.[5] Doubt arose as to whether, in this form, it was not broad enough to include local elections for school directors. Since the object was to embrace only general political elections,[6] it was amended so as to specify particularly what elections were referred to, and in this form was finally passed.[7]

With this precedent before them, the failure of the framers of the Fifteenth Amendment to insert any words limiting the number and kind of elections referred to indicated that they intended it to apply to all elections held under the authority of the constitution and laws of the United States or of the States. It was, in fact, well understood in Congress at the time the Amendment was under consideration that it applied to any election, from that for presidential elector down to the most petty election for a justice of the peace or a fence-viewer.[8]

The meaning of the term "abridged," as used in the Fifteenth Amendment, was not discussed at the time that measure was under consideration. The same word in the second section of the Fourteenth Amendment was thought by some to convey an erroneous idea. The right to vote was held to be a unit, as indivisible and incapable of abridgment as a mathematical point. A man must possess the right to vote either in its entirety or not at all.[9] This

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[4] Cf. Albion W. Tourgee in the Forum, March, 1890, pp. 78–91.
[5] Globe, 39th Cong., 1st sess., p. 2286.
[6] Ibid., p. 3010.
[7] Ibid., p. 3029.
[8] See remarks of Vickers of Maryland, Globe, 40th Cong., 3d sess., p. 905.
[9] Howard of Michigan, Globe, 39th Cong., 1st sess., p. 3039.

reasoning would seem to be correct from the standpoint of any particular individual in respect to his right in connection with any particular election. But it merely shows that the Amendment was intended to apply to the right of suffrage in general, or to secure this right to classes as well as to individuals. The more usually accepted view in regard to the meaning of this word was that it was designed to prevent a State from imposing less easily attained qualifications for voting on one class of citizens than on another.[10]

The language of the Fifteenth Amendment indicates that it is intended to protect the right of citizens to vote against the hostile action not only of the States but also of the United States. There was, however, no preexistent condition supposed to call for remedy in the case of the United States as there was in that of the States. Wherever the Federal Government had direct control over the qualifications of voters, all racial distinctions had already been obliterated. To many, therefore, this restriction upon the power of the United States seemed uncalled for, and at one stage of the proceedings the House passed a proposition in which the words "by the United States" were omitted.[11] In the Senate, Howard of Michigan expressed the view that to lay such a prohibition upon the United States was not only unnecessary but positively vicious. This state of affairs would result from the universality of the substantive right which the prohibition was designed to protect. The right of the citizens of the United States to vote was, of course, a right attaching to citizens in the States as well as to citizens in the District of Columbia and the Territories. Accordingly, when the Amendment went on to provide that such right should not be denied by the United States, it prohibited the United States from denying the right to vote in the States as well as in the Territories. As the United States had never possessed the power to deny the right to vote in the States, the enactment of a prohibition in this regard was absolute surplusage. But,

[10] Cf. Globe, 39th Cong., 1st sess., pp. 353, 2767.
[11] House Journal, 40th Cong., 3d sess., p. 409.

Howard went on to argue, to deny to the United States the power to restrict the right of suffrage in the States on account of race, color, or previous condition, carried with it the unavoidable implication that the United States was invested with the power to deny the right to vote in the States on other grounds.[12]

This argument, however, is not convincing. The Amendment might have been more explicit if it had provided that the right to vote in the Territories and in the District of Columbia should not be abridged by the United States, and that the right to vote in each State should not be abridged by that State. But this is so clearly implied that it does not seem necessary to express it. Howard's argument would support equally well the contention that the Amendment authorized a State to prescribe qualifications for voting in another State or in a Territory. The Amendment does not disturb the line of demarcation between the respective voter-making powers of the United States and of the States, but merely qualifies the powers of these governments over the suffrage when operating within their respective spheres.

The grounds which the Amendment prohibits the United States and the States from setting up as disqualifications for voting are race, color, and previous condition of servitude. It might be inferred that the Amendment was designed to remedy existing evils supposed to arise from actual disqualification on these grounds. According to the constitutions and laws of sixteen States in 1869, negroes were excluded from the suffrage indirectly by the use of the word "white" as one of the qualifications of voters. Two of these States also expressly excluded negroes and mulattoes, and one expressly excluded Chinese.[13] There were, consequently, persons in some States who were excluded from the suffrage on account of race or color. There might have been some room for the supposition that exclusion on these accounts was merely a convenient and generally accurate means of differentiation between those

[12] Globe, 40th Cong., 3d sess., p. 1304.
[13] H. Rept. No. 3, 41st Cong., 2d sess., p. 91.

who were considered fit and those who were considered unfit to participate in the elective franchise, while the real basis and ground of exclusion was some less obvious but deeper-seated difference between persons than mere race or color.

However this might be, the Amendment as framed was founded upon a supposed distinction between races and colors of persons capable of being legally determined. The indefiniteness of these words as originally used in the Blaine amendment had not escaped the attention of Congress. The rather pertinent question had been asked, "What is a race of men?" It was pointed out that writers on the subject varied all the way from four or five up to nearly a thousand as the number of races of mankind. Neither was there any constitutional standard of color by which to test state laws upon the subject. The ethnological condition of things in this country prevented these words from having any very distinct meaning.[14]

When the same words in the Fifteenth Amendment came under consideration, Senator Fessenden questioned whether there was any such received division and enumeration of races or colors as that no doubt could be cast upon its meaning.[15] Some held the view that the ex-slaves were of no specific color and of no particular race, and that, consequently, the use of these words in the Amendment would furnish no protection to the slave class.[16] As to the application of these words to Anglo-Saxons and to the various nationalities of Europeans, there was no convergence of opinion.[17] The only classes of men to which it was generally understood that the words "race or color" applied were negroes, Chinese, and Indians.[18]

[14] Broomall of Pennsylvania, Cong. Globe, 39th Cong., 1st sess., p. 433.

[15] Globe, 40th Cong., 3d sess., p. 938.

[16] Boutwell of Massachusetts, Globe, 40th Cong., 3d sess., p. 1225.

[17] For opinions on this point, see Globe, 39th Cong., 1st sess., pp. 354, 433; ibid., 40th Cong., 3d sess., pp. 938, 1303, 1427; and editorial in New York World, March 7, 1869.

[18] Cf. National Intelligencer, March 4, 1869 (editorial). Thaddeus Stevens had admitted in 1866 that if the laws of California ex-

The bearing of the Amendment upon Chinese suffrage produced an imbroglio between the politicians, the humanitarians, and the local autonomists. From the standpoint of the politicians, the introduction of the Chinese issue was an entirely uncalled for complication. But the humanitarians could not consistently withdraw from their position merely because it involved the possible extension of suffrage to a few thousand Chinamen on the Pacific Coast. When, said Senator Trumbull of Illinois, we attempt to amend the Constitution so as to carry out the great principle of human rights, it seems very inconsistent "to declare that the Hottentots and cannibals from Africa shall have the right to vote" and at the same time to exclude the citizens of the oldest empire on earth.[19]

The local autonomists deprecated the imposition of the Chinese vote upon the people of the Pacific Coast without their consent on the ground that the latter were the best judges of their own local conditions and needs.[20] The senators from the Pacific Coast States were broad humanitarians as far as the negro was concerned, but, in the language of the New York Herald, "when all at once the Chinaman loomed up, they discovered a shade of color and a peculiarity of race they had hitherto entirely overlooked."[21] They declared that to deprive the Pacific Coast States of the power to withhold suffrage from Chinese would hand over that section of the country to political degradation and moral pollution.[22] As their votes, however, were not necessary to carry the Amendment through, no concession was made to them. The attitude of the House in regard to the Chinese imbroglio was indicated by the refusal of that body, by a vote of 42 to 106, to suspend the rules for the introduction of the following resolution: "Resolved, that in

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cluded Chinese because they were Chinese, they would fall within the operation of the Blaine amendment. See Globe, 39th Cong., 1st sess., p. 376.

[19] Globe, 40th Cong., 3d sess., p. 1036.

[20] Hendricks of Indiana, Globe, 40th Cong., 3d sess., p. 990.

[21] February 10, 1869, p. 3.

[22] Williams and Corbett of Oregon, Globe, 40th Cong., 3d sess., pp. 901, 939-40, 1035.

passing the . . . Fifteenth Amendment . . . this House never intended that Chinese or Mongolians should become voters."[23]

The third ground of discrimination which is prohibited by the Amendment, viz., previous condition of servitude, was not intended to remedy a preexistent evil, for no case has been discovered in which any State had excluded persons from the suffrage on this ground. It was not included in the Blaine amendment because it was thought unnecessary. Thaddeus Stevens stated that there never was a court in the United States which would not have admitted that, if one held as a slave could prove himself to be white, he was that instant free. From this he drew the inference that any exclusion or discrimination on account of previous condition of servitude must be on account of race or color. Hence, the express inclusion of the phrase "previous condition of servitude" was entirely superfluous.[24]

The same view was held by Bingham of Ohio in respect to the Fifteenth Amendment. Servitude, he said, was embraced in the words "race or color," and the legal effect of the Amendment would not be changed by omitting direct reference to it.[25] The view that finally prevailed, however, was that since the ex-slaves were of various races and colors, direct reference must be made to servitude in order to prevent the States from providing by law that persons who had been held in slavery, or whose mothers had been slaves, should not vote.[26]

It will be noticed that the Amendment as adopted does not state specifically whether the race, color, and previous condition referred to are to be considered as attaching to the prospective voter, or to some other person or persons related to him by way of ancestry or otherwise. If these attributes are to be construed as belonging only to the prospective voter, there would seem to be nothing to prevent a

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[23] Globe, 41st Cong., 1st sess., p. 202.
[24] Globe, 39th Cong., 1st sess., p. 537.
[25] Globe, 40th Cong., 3d sess., p. 1225.
[26] Ibid.

State from disfranchising a person on account of the race, color, or previous condition of his ancestors. It was doubtless in order to provide for this contingency that the House, at one stage of the proceedings, passed an amendment designed to prohibit discrimination on account of the race, color, or previous condition "of any citizen or class of citizens of the United States."[27] In the Senate these qualifying words were thought unnecessary, because the attributes named apply by implication both to the citizen himself and to the class of which he is a member.[28] But this construction, it was pointed out, was founded upon a misconception. The right to vote was a right which could not properly be predicated of masses of people, but only of the individual. Hence, a particular individual's right to vote could not be affected by the right of any other citizen or class of citizens.[29] The result is that, as actually adopted, the Amendment cannot be construed so as to include the attributes of a would-be voter's ancestors as well as his own without involving an incorrect theory of a legal right.

The form in which the Amendment was moulded gave rise to a widespread belief that it would be in large measure evaded. We have seen that, chiefly on account of the strength of the states' rights feeling, the framers were not able to embody in it an affirmative definition of electorship.[30] Had they been able to do so, it would of course have taken from the States the jurisdiction which they previously possessed over the qualifications of voters. Under the Amendment as actually passed, however, the power still remained with the States to prescribe all qualifications which they had previously been competent to prescribe, with the exception of the three named in the Amendment. It was known that the Southern States would avail themselves of any loophole in order to disfranchise the negroes.[31] Many feared that

[27] Globe, 40th Cong., 3d sess., p. 286; House Journal, 40th Cong., 3d sess., p. 237; above, p. 23.
[28] Stewart of Nevada, Globe, 40th Cong., 3d sess., p. 1000.
[29] Ibid.
[30] Above, Chapter II.
[31] Globe, 40th Cong., 3d sess., Appendix, p. 97.

the form and language of the Amendment would furnish them abundant opportunity to attain this object. This apprehension was based upon an interpretation of the Amendment according to the principle, "expressio unius est exclusio alterius." To provide in the Constitution that the States should not disfranchise for the three specified causes was impliedly to authorize them to disfranchise for all other conceivable causes. Thus the Amendment would operate as a virtual legalization of disfranchisement. Under it an aristocracy of property, of intellect, or of sect might be established.[32] Although the animus of the Amendment was a desire to protect and enfranchise the colored people, yet it was anticipated that under it nine tenths of them might be prevented from voting by the requirement on the part of the States of intelligence or property qualifications.[33] Senator Morton of Indiana was especially impressed with this defect. He predicted that the Amendment would be practically nullified in the Southern States by the imposition of property or educational tests which would debar forty-nine out of every fifty colored men. He was of opinion, further, that the whole provision might be dodged by providing that colored men should not vote on account of their alleged deficiency in natural intelligence, their incapacity for improvement, and their incompetency to take part in the administration of the government.[34]

Similarly, Williams of Oregon thought that if a State should pass disfranchising legislation not based on any of the three specified grounds it would be valid legislation as far as the Amendment was concerned. He pointed out that under many of the constitutions of the reconstructed States white men were disfranchised for some antecedent acts in their lives, and that the same device might be turned against the negroes. The white people of a State might decide that the negroes were disloyal, or were disturbers of the public peace, and on that account should not be allowed to vote.

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[32] Bingham of Ohio, Globe, 40th Cong., 3d sess., p. 722.
[33] Ibid., p. 862.
[34] Ibid., p. 863.

They might provide by law that all persons supporting a certain measure or voting for a certain candidate should be disfranchised. While such a law would apply ostensibly to white and black alike, it might actually result in the disfranchisement of nearly all the colored citizens of the State, and there would be no remedy for that condition under the Amendment.[35]

Conkling of New York also considered the Amendment utterly inadequate and ineffective on account of its omissions. One obvious method by which it could be evaded, he said, was the full power which it allowed any State to provide by law that "disingenuousness of birth" should be deemed a disqualification to exercise the right to vote.[36] The fact that the family life of the Africans was still in a rudimentary state as compared with Anglo-Saxon standards would constitute a line of cleavage between the two races, and would afford an opportunity for the operation of a law applying literally to both but practically to only one. Such a law might be made especially severe by placing the onus probandi on the would-be voter, requiring him to prove his "genuousness" of birth.[37]

These opinions in regard to the inadequacy of the Amendment were apparently based upon the theory that it would be strictly and literally construed by the courts, and its effect confined within the narrowest possible limits. There were others, however, who appeared to base their conclusions as to the efficiency of the Amendment upon the opposite ground, that it would be construed in the light of its spirit and manifest purpose.

The same divergence of opinion had emerged in the interpretation of the language of the Blaine amendment. Those who construed that amendment strictly had supposed that if a State should pass a law excluding negroes for any other ostensible reason than race or color, and should accompany the act by a preamble declaring that such exclusion was not

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[35] Globe, 40th Cong., 3d sess., p. 900.
[36] Ibid., p. 1316.
[37] Ibid.

on account of race or color, or even if no reason were given, the Amendment would be defeated.[38] It might also be circumvented, they declared, by a state enactment providing that a man should not vote unless he could read and write, and then making it a penal offense to teach negroes to read or write. Or, a State might make it a prerequisite for voting that a man have a settled occupation, and then declare that the negroes had no regular occupation.[39]

The broad constructionists, on the other hand, had declared that the instant a State said a man of a certain race should not vote because he was ignorant, but that a man of another race who was just as ignorant might vote, the exclusion would be on account of race merely.[40] On similar grounds, Thaddeus Stevens had intimated that if a State should provide by law that no negro could hold real estate, and should then prescribe the possession of an interest in land as a prerequisite for voting, it would be a disqualification of the negro on account of race or color.[41]

As opposed to the arguments of those who maintained that the Fifteenth Amendment would make the Constitution weaker, on account of the powers which it impliedly handed over to the States, Senator Edmunds denied emphatically that it would operate as a legalization of disfranchisement. It was, he declared, entirely inadmissible, from the standpoint of either law or logic, to say that because it is provided that the States shall not deny to anybody the right to vote for a particular reason, it is implied that they may deny it for all other reasons.[42] The attitude of the broad constructionists was illustrated by the answer given by Senator Stewart to the objection raised by Senator Conkling. "Disingenuousness of birth," he said, was clearly included in previous condition of servitude. It was a condition growing out of, and incidental to, slavery. Hence, under any

[38] Rogers of New Jersey, Globe, 39th Cong., 1st sess., p. 358; Ward of New York, ibid., p. 434.
[39] Farnsworth of Illinois, ibid., p. 383.
[40] Conkling of New York, ibid., p. 358.
[41] Globe, 39th Cong., 1st sess., p. 376.
[42] Globe, 40th Cong., 3d sess., p. 1305.

fair judicial construction, the prescription of such a qualification for voting would be nullified by the Amendment.[43]

An omission in the Amendment which received especial condemnation in the Senate was the fact that it did not undertake to protect the right to hold office as well as the right to vote. With this omission it would be a "lame and halting proposition, an outrage upon the good sense of the country, and the declaration of only half of an indivisible truth."[44] It would set up an aristocratic class of office-holders, and would give the negroes only the "husk and shell of the feast of political equality" to which they had been invited, while reserving the substance for the whites.[45] Senator Wilson of Massachusetts was afraid that this result would enable the enemies of negro suffrage to accuse the framers of the Amendment of being actuated not by a sense of justice, but by a love of power; of being willing that the negroes should vote for them, but not for members of their own race.[46]

On the other hand, the opinion was held that to include the right to hold office was entirely unnecessary, inasmuch as that right was undoubtedly a legal consequence of the right to vote.[47] It was regarded as certain that if the black population was elevated to the condition of voters and allowed in this way to participate in the enactment of laws and the regulation of the affairs of the State, they must necessarily be allowed the privilege of holding office, if fit for it in other respects.[48]

The second section of the Amendment, which is modelled on similar sections in the Thirteenth and Fourteenth Amendments, was included because it was thought that without it the power of Congress would not be sufficiently extensive to secure the due enforcement of the primary provision.[49]

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[43] Globe, 40th Cong., 3d sess., p. 1317.
[44] Edmunds of Vermont, ibid., p. 1626.
[45] Ibid.
[46] Ibid., p. 1307.
[47] Boutwell and Butler of Massachusetts, ibid., p. 1426.
[48] Howard of Michigan, Globe, 40th Cong., 3d sess., p. 1302.
[49] According to the statement of Senator Reverdy Johnson, the enforcement section was inserted in the Thirteenth Amendment

Those, however, who were opposed to a suffrage amendment of any kind maintained that the inclusion of this section would give Congress complete control over all elections. The power to enforce was held necessarily to imply power over state elections. It would enable Congress to appoint judges of election and to send officers to secure order at the polls, to count the votes, and to decide the result.[50] Thus the second section would become the "last screw in the coffin of American liberty." It would take away from the States all power in regard to every election, federal and state, and consolidate the entire political power of the country in the hands of the general Government. Under it Congress might send "satraps" into every election district in the country, and relieve the States from all further attention to the subject.[51] Moreover, the Amendment contained no definition of "appropriate legislation," but left the meaning of these words to be determined by Congress itself.[52]

As opposed to the view that the second section would confer on Congress almost unlimited power over elections, the opinion was expressed that the Amendment was a simple declaratory resolution, because, although the power was given Congress to enforce it by appropriate legislation, such legislation would always be difficult of execution, and therefore inefficient.[53] It had been thought that the similar section in the Fourteenth Amendment would enable Congress, in case the States should enact laws in conflict with the principles of the Amendment, to correct that legislation by a formal enactment.[54] In reference to the Fifteenth Amendment, it was said that if the States should not feel called

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because the mere declaration of the abolition of slavery would not of itself have given Congress any legislative power in the premises. Globe, 39th Cong., 1st sess., p. 768.

[50] Doolittle of Wisconsin, Globe, 40th Cong., 3d sess., Appendix, p. 151.

[51] Woodward of Pennsylvania, Globe, 41st Cong., 2d sess., p. 255.

[52] Saulsbury of Delaware, Globe, 40th Cong., 3d sess., Appendix, p. 163.

[53] New York Nation, February 18, 1869, p. 124.

[54] Howard of Michigan, Globe, 39th Cong., 1st sess., p. 2768.

upon to carry the Amendment into effect by appropriate legislation, the door would then be open for calling the second section into operation.[55] This statement would seem to imply that, although the power of enforcing the Amendment was a concurrent power between Congress and the States, yet the power of Congress was to remain dormant as long as there existed proper state laws on the subject.

Attention was drawn by Senator Howard to the great defect of the Fifteenth Amendment, namely, that it did not confer upon the colored man the right to vote. He was of opinion, however, that this defect might be partly remedied by the action of Congress under the enforcement section. If any State should divest the colored man of his right to vote, Congress might take steps under this section to correct the error in the state law and restore the right. Thus the right to vote might be imparted to the colored man by direct congressional legislation.[56]

This view was expressed even more strongly by Bingham. The enforcement section, he said, would go far toward remedying the negative character of the Amendment. It would enable Congress to secure uniformity in the qualifications of electors in all the States, for whenever Congress is invested with the power to enforce the limitations of the Constitution, even upon the States, the exercise of the power will be as uniform as the exercise of any affirmative power could possibly be.[57] The idea, however, that the Amendment might be made affirmative in character by means of the enforcement section was not generally concurred in. Jenckes of Rhode Island was not convinced that any such result would be brought about, but thought that, by its negative character, the Amendment would only increase the difficulties in the way of settling the question of suffrage in the various States upon a uniform basis.[58]

The prohibitions of the Fourteenth Amendment are limi-

[55] Axtell of California, Globe, 41st Cong., 2d sess., p. 258.
[56] Globe, 40th Cong., 3d sess., p. 1625.
[57] Ibid., p. 727.
[58] Ibid., p. 728.

tations upon the state governments, while the first ten amendments are restrictions upon the power of the general Government.[59] The Fifteenth Amendment is both, and the enforcement section is operative against both. It was the purpose of the people in adopting the first ten amendments to reserve to themselves and to the States the power to secure the rights enumerated therein against the action of Congress.[60] But security against the action of Congress in contravening the right conferred by the Fifteenth Amendment is committed, by the enforcement section, to Congress itself. This incongruity was apparently not noticed at the time the Amendment was adopted. It was afterwards declared, however, that it would be an "aggravated solecism" to presume that Congress could with deliberation pass a law creating or continuing this prohibited distinction of race or color, and in the same or by some other law punish its officers for executing it.[61] But Congress might provide for the punishment of a subordinate executive officer of the United States who should make such a distinction in spite of the valid laws of Congress. A violation of the Amendment by Congress itself would, of course, be corrected by the courts. The only way in which Congress could enforce the prohibition against itself would be by repealing laws passed in conflict with the Amendment, and this it could of course do independently of the power granted in the enforcement section. The neglect of this phase of the subject in the congressional debates was due to the fact that the attention of both the supporters and the opponents of the measure was focused upon the limitation to be placed upon the power of the state governments.

Thus far in this chapter we have been mainly concerned with the congressional interpretation of particular parts of the Amendment. We shall now consider some of the positions taken in regard to the measure as a whole.

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[59] Barron vs. Baltimore, 7 Pet. 243.
[60] United States vs. Hall, Fed. Cas. No. 15282.
[61] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, p. 354.

An argument of a general character which was put forth against the Amendment was that the expediency of such a measure was not supported by the facts of the situation. In order to justify any amendment to the Constitution the burden of proof rested upon the promoters of the project to show (*a*) the necessity of its being made, arising from evils suffered from its not having been made; (*b*) the non-existence of these evils if the amendment should be made; and (*c*) the fact that these evils were greater than others that might result from the making of the amendment.[62] It was denied that there had been proof of evils resulting from negro disfranchisement, or that the policy of extending suffrage to negroes had been justified by the results. The governments established in some States under that policy were not so successful in protecting person and property, or in promoting the general peace and security of society, as to warrant a measure for making negro suffrage permanent in all the States.[63]

In spite of this condition of affairs, the opinion was expressed that the Amendment was not an experiment to be fairly tried and abandoned if found baneful. It was to be an institution.[64] It rested upon the assumption that negro suffrage was a demonstrated success, and might safely be fixed irreversibly in the Constitution. The trial of negro suffrage ought to be made under existing laws without closing the door against retreat. While the experiment was in progress the law should be left flexible enough for the redress of evils in proportion as they might be disclosed. The wholesale exercise by negroes of the right to vote might prove not very objectionable in some States and calamitous in others. If the Constitution were left as it was, negro suffrage might be abolished or qualified in States where experience did not sanction it, and be left undisturbed in States where it proved satisfactory. It was absurd to put

[62] Saulsbury of Delaware, Globe, 40th Cong., 3d sess., Appendix, p. 165.
[63] Hendricks of Indiana, Globe, 40th Cong., 3d sess., pp. 673, 989.
[64] National Intelligencer, March 4, 1869, p. 2.

the matter in such shape that partial evils could not be corrected without the overthrow of the whole system. To fix the matter irreversibly in the Constitution might cause an attempt in some quarters to counteract its mischiefs by rendering suffrage itself a nullity.[65]

The chief arguments put forth against the Amendment by the local autonomists were based upon the nature of the federal system of government, and the necessity of preventing one part of the system from encroaching upon the other. As a corollary from this general principle, the contention was made that the so-called amendment was beyond the amending power. The scope of this power was held to be limited to the correction of defects which might appear in the practical operations of the Government.[66] An amendment could not grant new powers to the general Government, but it must be incidental to powers already granted,[67] in order that the existing distribution of power between the general Government and the States might be preserved.[68] Any change that extended beyond these general limitations was not an amendment at all, but a revolution and a subversion of the form of government.

The particular feature of the Amendment which was most strongly objected to by the local autonomists was the fact that it applied to state as well as to federal elections. The Amendment was declared to rise far above any mere detail as to whether a negro or a Chinaman should vote. It was not a question as to who should vote, but as to who should make the voter.[69] A State could not maintain a republican form of government unless it had full power to determine who should vote in its own elections.[70] The Amendment ought at least to be confined to those elections in which the whole country in its united capacity was con-

[65] New York World, February 1–3, 1869 (editorials).
[66] Hendricks of Indiana, Globe, 40th Cong., 3d sess., p. 988.
[67] Saulsbury of Delaware, Globe, 40th Cong., 3d sess., Appendix, p. 161.
[68] Buckalew of Pennsylvania, Globe, 40th Cong., 3d sess., p. 1639; Davis of Kentucky, ibid., Appendix, p. 285.
[69] Dixon of Connecticut, ibid., p. 705.
[70] Doolittle of Wisconsin, ibid., Appendix, p. 151.

cerned.[71] Even such nationalists as Hamilton and Story had intimated that federal power over state elections might well be regarded as "an unwarrantable transposition of power and a premeditated engine for the destruction of the State governments."[72] The principle laid down by Marshall in McCulloch vs. Maryland, that "there is a plain repugnance in conferring on one government a power to control the constitutional measures of another," was as applicable to federal control over state elections as to state control over federal institutions.[73] There could be no self-government in a State if any power beyond its control could determine who should exercise the right of suffrage in it; for the power which determines who shall vote in a State indirectly governs the State.[74] Since, for all practical purposes, the voters or political people of a State constitute the State, the principle underlying the Amendment was that three fourths of the States, acting as distinct political communities by way of the amending power, could reach into a co-State and change it; could decree that those who governed it should govern it no longer, or that they should participate in the operation of the government with others against their will.[75] Thus an outside power would dictate not only who should be the voters in a State, but also who should be its lawmakers and what subjects its laws should operate upon. This result would consolidate all power in the central Government and reduce the States to the condition of subject provinces.[76]

The nationalists did not attempt to reply to the objection of the local autonomists that the Amendment applied to purely local elections, in which the general Government could have no concern. Even the Cincinnati Commercial, which was strongly in favor of a suffrage amendment, intimated

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[71] Buckalew of Pennsylvania, ibid., p. 1286.

[72] The Federalist, No. 59; Story's Commentaries, sect. 817.

[73] Davis of Kentucky, Globe, 40th Cong., 3d sess., p. 988.

[74] Doolittle of Wisconsin, ibid., Appendix, p. 151.

[75] Buckalew of Pennsylvania, Globe, 40th Cong., 3d sess., p. 1639.

[76] Dixon of Connecticut, ibid., pp. 706–8; Bayard of Delaware, ibid., Appendix, p. 166.

that it would have been content if the Amendment had related only to federal elections.[77] The contention of the nationalists that the general Government ought to have the power to prescribe the qualifications of its own voters in order to be perfectly independent and self-sufficient was not broad enough to justify a federal amendment applying to purely state elections.

To the arguments of the local autonomists in regard to the limits of the amending power, however, the nationalists replied that there could be no question about the power to pass the Amendment, because the amending power was practically unlimited.[78] Inasmuch as the Amendment would leave the voter-making power in the States, modified only in certain particulars, it would not subvert the Government or radically change its form.[79] Ridicule was cast upon the argument that the Amendment would consolidate the Government and reduce the States to provinces. Such a cry of alarm, it was said, would not deceive the people, because the latter had the right to adopt the constitutional method of changing their form of government at will.[80]

The arguments against the Amendment were declared to be the same as those which had been put forth years before in favor of secession. They ignored the fact that the United States was a nation.[81] The bane of the Government in the past had been not centralization, but disintegration.[82] To allow the States unlimited control over the suffrage would endanger the autonomic character of the general Government. The Amendment was in fact a measure of wise consolidation. It trenched upon no right of which a State could justly be jealous. The first essential of a popular national government was the equality of

[77] February 1, 1869 (editorial).
[78] Ward of New York, Globe, 40th Cong., 3d sess., p. 724; Warner of Alabama, ibid., p. 988.
[79] Frelinghuysen of New Jersey, ibid., p. 978.
[80] Cincinnati Commercial, February 1, 1869.
[81] Morton of Indiana, Globe, 40th Cong., 3d sess., p. 990.
[82] Abbott of North Carolina, ibid., p. 981; Ross of Kansas, ibid., p. 984.

its citizens equally secured. No nation could be truly republican which denied to any portion of its citizens equal laws and equal rights. The adoption of the Amendment would be a declaration of the people that they perceived the legitimate conditions of a truly national union.[83]

[83] Harper's Weekly, February 13, 1869, p. 99.

CHAPTER IV.

The Amendment Before the States.

On February 27, 1869, the Amendment was certified to the States, and was immediately ratified by a number of them. Several of these rather precipitately attempted to ratify upon telegraphic information without waiting for the official copy.

The copy which was ratified by the Nevada legislature on March 1[1] was correct, but those ratified by Kansas on February 27[2] and by Missouri on March 1[3] were defective. In the latter State, the duly attested copy was not received until March 8, and the copy which the legislature had ratified contained only the first section. Both these ratifications were therefore void through informality, and these States did not finally ratify until the following year.

On March 4 North Carolina ratified.[4] Governor Holden, in recommending such action to the legislature, said: "By the proposed Amendment the right to vote will be secured to every citizen and will not depend on the will of the States . . . This right should be as lasting as the Constitution itself. Every type of man who is a citizen of the United States is presumed to be capable of self-government. . . . The gift of freedom to the colored race would be worse than worthless if not accompanied by the right to vote. The adoption of the Amendment will place the right of full citizenship where no future change or convulsion can destroy it."[5]

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[1] Nevada Assembly Journal, 1869, p. 243. Vote: 23 to 9.

[2] Kansas House Journal, 1869, p. 913. Vote: Senate, unanimously, House, 64 to 7. New York Tribune, March 1, 1869.

[3] Missouri Senate Journal, 1869, p. 434. Vote: 23 to 9. House Journal, p. 605. Vote: 79 to 30.

[4] North Carolina Senate Journal, 1869, p. 402. Vote: 25 to 6. House Journal, p. 348. Vote: 63 to 13.

[5] North Carolina House Journal, 1869, pp. 343-5.

Illinois ratified on March 5.[6] Governor Palmer of that State recommended the ratification of the Amendment as "the crowning act of justice and statesmanship, which closes the greatest and noblest struggle the world has known, and will make Liberty and Union one and inseparable now and forever."[7]

On the same day ratification was effected by Michigan.[8] In the House, the minority of the Committee on Federal Relations made the following adverse report: "The proposed Amendment is an encroachment upon the rights of the States and of the people . . . and tends to weaken and destroy the checks and balances wisely framed by the fathers of the Republic, and designed by them for all time to protect the people of the Union in the enjoyment of their social and political rights, and the blessing of a free government."[9]

A protest against the ratification signed by twenty-two members of the Michigan House was as follows: "The ratification of the proposed Amendment will take from our people the right to impose an educational electoral qualification. . . . We neither admit nor deny that the Amendment is one in the cause of humanity, but we protest that this is but the entering wedge to still further encroachments upon the rights of the people of the several States. . . . Other measures will follow until the consolidation of power in the general government will be complete and the States shorn of their right to legislate for their own internal welfare and interests.

"If Congress legislates under the second section of the Amendment, we shall probably see registry laws and laws regulating elections at our doors, enacted by a power we cannot reach or control. Officers under the pay of the general government, and only amenable to that government,

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[6] Illinois Senate Journal, 1869, Vol. II, p. 262. Vote: 18 to 7. House Journal, Vol. II, p. 741. Vote: 54 to 28.

[7] Illinois House Journal, Vol. II, p. 733.

[8] Michigan House Journal, 1869, p. 1104. Vote: 68 to 24. Senate Journal, p. 739. Vote: 25 to 5.

[9] Michigan House Journal, 1869, p. 1098.

will arbitrarily decide who may register and vote in all elections, our elections will be under the control of men not chosen by us, and by these means we may suffer the evils of those States called re-constructed, while by increase of officers, official corruption will increase, and our debt will ultimately bankrupt us as a nation, and reduce us to the alternatives of anarchy or despotism."[10]

In South Carolina, where the negroes were not only voting but governing, the Amendment was ratified on March 11 with little opposition.[11] The three members in the House who voted against gave as their reason that it was contrary to the spirit of the "federal compact" for Congress to interfere with the subject of suffrage. They admitted that the Amendment would not have any positive effect in South Carolina, but feared that its negative influence would be very important as tending toward centralization and an aristocratic government.[12]

One of the most spirited contests that took place over the ratification of the Amendment was in the legislature of Pennsylvania. In that body, the Amendment was referred to the Committee on Federal Relations, which returned majority and minority reports. The minority report did not discuss the merits of the Amendment itself, but took the stand that the legislature had no moral right either to ratify or to reject. A technical reading of the Federal Constitution gave it this power, but power over the suffrage was lodged in neither the federal nor the state government, but was reserved to the people. The regulations on this subject had been fixed by the people in the state constitution, in order that the legislature might not control them. Since the legislature was entirely subordinate to, and limited by, the state constitution, it would be a usurpation of authority and a revolution for it to assume to change, even with the concurrence of the other States, the regulations

[10] Michigan House Journal, 1869, pp. 1099–1103.

[11] South Carolina House Journal, 1869, p. 517. Vote: 88 to 3. Senate Journal, p. 418. Vote: 18 to 1.

[12] South Carolina House Journal, 1869, p. 517.

of the state constitution on the fundamental subject of suffrage. The duty of the legislature, therefore, was to submit the proposition to the people, in whom alone resided the power to change the state constitution. The matter to be determined was not whether the Amendment should be ratified, but the far graver question, Shall the people be deprived of their right to pass upon the question of its ratification or rejection?[13]

The majority of the Committee on Federal Relations recommended ratification on the ground that it was an act of simple justice, of the highest expediency, and of the most considerate statesmanship. It was anomalous that the black man had been freed without being at the same time enfranchised. The adoption of the Amendment would merely make uniform over the whole country the conditions of suffrage which already existed in the South. The negroes in the North were few and educated, but in the South many and ignorant. Should it be said that "we asked the South to drain the cup, while we found one drop too bitter?" The negro must eventually vote. Why not make him a voter at once, and thus remove from the politics of the State a question which, as long as it remained unsettled, must be a source of vexatious agitation?[14]

When these reports were submitted to the legislature, a lengthy debate ensued. Those who opposed the Amendment characterized it as a monstrous political crime against the sovereignty and majesty of the people. It would sap the very foundations of the liberties of the people and surrender them to a centralized despotism. Suffrage was a matter belonging properly to domestic state regulation, and the legislature had no right to transfer the regulation of the subject to any power outside the State.[15] If the Amendment should be adopted and the State should refuse to admit the right of the negro to vote, then Congress would have power to compel the inhabitants and legal voters of Penn-

[13] Pennsylvania Legislative Record, March 10, 1869, p. 540.
[14] Pennsylvania Legislative Record, 1869, p. 540.
[15] Ibid., pp. 954–9.

sylvania to admit the negro to the polls.[16] The controlling power of Congress would enable the officers of the Federal Government to usurp all power and tyrannize over the localities. The result of the adoption of the Amendment would be to extend to the Northern States the same kind of despotism that Congress had been practising in the South. Confusion and anarchy would be the result and there would remain but one step to monarchy.[17] The nation had more to dread from extending than from restricting the suffrage. Already the confidence of thinking men in the republican system of government was shaken, owing to the corruptions at elections. The adoption of the Amendment would only increase these evils, and make complete the mockery of popular government.[18]

In opposition to these views, it was declared that the adoption of the Amendment would be the completion and realization of the ideal government, whose broad foundation was laid in the Declaration of Independence. The power of the government would then be derived from the consent, not of a part of, but of all the governed.[19] The Amendment was not revolutionary, but was conservative of the spirit and genius of our institutions.

The statement was made that there were only two arguments against the Amendment entitled to consideration, (*a*) the negro was unfit for self-government, and (*b*) the Federal Constitution was not the proper place to regulate the suffrage. As to the first, the negro had the capacity to learn self-government, and the danger of admitting him to the suffrage was less than the danger of class government. The second argument resolved itself into the question whether the States or the nation was sovereign. If the latter, the Federal Constitution was exactly the place to regulate the suffrage. If the States were allowed the unlimited right to control the suffrage, any State might abolish a

[16] Ibid., p. 925.
[17] Ibid., p. 663.
[18] Ibid., p. 895.
[19] Ibid., p. 864.

republican form of government and establish an oligarchy. The question of suffrage was of national importance, and it should be rendered uniform in all the States by federal amendment.[20]

Those who favored the Amendment voted down all proposals made by the minority to submit its ratification or rejection to the decision of the people at the next general election, and on March 25, 1869, Pennsylvania finally ratified.[21]

In Arkansas the sentiment in favor of the Amendment was so strong in the legislature that it was ratified almost unanimously.[22] There was little need for argument, but it was stated as a ground for the action of the legislature that the Amendment did not propose to alienate a single right enjoyed by any class of people. It only aimed to make national what had hitherto been sectional. It denied the assertion so often made that negro suffrage had been forced upon the Southern people as a punishment, but recognized it as a matter of national justice.[23]

In Indiana a special session of the legislature was called for the purpose of considering the Amendment. The violent controversy which took place when it assembled had but slight relation to the merits or defects of the Amendment itself. The minority attacked it as a concentration of power in the hands of the general Government, and as a subversion of the principles of government established by the founders of the republic.[24] The majority upheld it as a measure without which the country could not attain the acme of its development. Since the negro had received citizenship, it was absurd to deny him that absolute protection which could be guaranteed only by the ballot. The

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[20] Pennsylvania Legislative Record, 1869, p. 957.

[21] Pennsylvania Senate Journal, 1869, p. 570. Vote: 18 to 15. House Journal, 1869, p. 767. Vote: 61 to 38.

[22] Arkansas Senate Journal, 1869, p. 563. Vote: 19 to 2. House Journal, 1869, p. 658. Vote: 52 to 0.

[23] Arkansas Senate Journal, 1869, p. 563.

[24] Brevier (Ind.) Legislative Reports, Vol. XI, special sess., 1869, p. 289.

Amendment was one of the great reformatory movements of the age.[25]

The greatest amount of discussion, however, was as to the question of submitting the Amendment to the people. This the majority refused to do, and the minority endeavored to block action by resigning their seats. The constitution of the State required two thirds of the legislature as a quorum. In the House the resignation of the minority members left less than a quorum. But those who were left were more than a majority, and the speaker ruled that while two thirds was necessary for ordinary legislation, the constitution did not define what number more than a majority was necessary to ratify a proposed amendment to the Federal Constitution. Under this ruling the Amendment was then ratified.[26]

In his annual message to the Connecticut legislature on May 5, 1869, Governor Jewell, in recommending the ratification of the Amendment, said, "When this proposed Amendment becomes a part of the Constitution, a troublesome political question will have been settled, and justice will have been done a race, both of which results are called for by every consideration of sound public policy."[27] The Amendment was then promptly ratified by both houses.[28]

On June 8 the Florida legislature assembled in special session to consider the Amendment. Governor Reed, in recommending its ratification, said: "As a result of the War, the principle of free government and equal rights has become the acknowledged policy throughout the Union, and it is now proposed to put it forever at rest by making it a part of the Constitution. The adoption of the Amendment will render the States homogeneous, and will remove all occasion for further sectional controversy."[29]

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[25] Ibid., p. 301.

[26] Indiana House Journal, 1869, p. 602. Senate Journal, 1869, p. 475.

[27] Connecticut Legislative Documents, 1869, Doc. No. 2, p. 12.

[28] Connecticut Senate Journal, 1869, p. 51. House Journal, 1869, p. 36.

[29] Florida Senate Journal, extra session, 1869, p. 12.

This message was referred in both houses to the Committee on the Judiciary. In the Senate the minority of the committee reported adversely on the following ground: The power of regulating the right of suffrage affected the organization of the State itself, prescribing its relation to its own citizens. By this power alone could it safely control the choice of its own lawmakers and officers, and this power was essential to the very existence of the State, hence the Amendment was a direct step toward centralization, and a virtual overthrow of representative republican government in the States.[30]

In the Assembly the minority of the committee in its adverse report conceded that the Amendment would not affect the question of suffrage in Florida, but argued that in proposing it Congress had requested the States favorable thereto to put upon those opposed to it that which the framers of the Constitution had never intended should be imposed by even a constitutional number of States upon the others. There was nothing in the Constitution to justify one or many States in prescribing suffrage regulations for another. Suffrage was properly a local matter, to be regulated by each State for itself. The Amendment was antagonistic to the principles upon which the government was founded, and was subversive of the liberties of the people.[31] In spite of these arguments, however, both the Senate and the Assembly ratified the Amendment without delay.[32]

On October 20, 1869, Vermont ratified.[33] Governor Washburn, in his message transmitting the Amendment to the legislature, said: "The adoption of the Amendment will, for the first time in the history of the nation, give reality in fact to the truth enunciated in the Declaration of Independence, and incorporated in the Constitution of Vermont, that all men are created equal. It is a measure demanded alike by justice, good faith, and common humanity."[34]

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[30] Florida Senate Journal, extra session, 1869, p. 29.
[31] Florida Assembly Journal, extra session, 1869, pp. 17–19.
[32] Senate Journal, p. 33. Assembly Journal, p. 23.
[33] Vermont House Journal, 1869, p. 48. Senate Journal, 1869, p. 41.
[34] Vermont Legislative Documents, 1869, Doc. No. 1, p. 14.

The attempted ratification of Kansas, on February 27, 1869, having been deemed void by the secretary of state,[35] Governor Harvey, in his annual message of January 11, 1870, recommended that it be re-ratified. He thought that the adoption of the Amendment would relieve judges of election of the responsible duty of inquests as to the existence of a visible admixture of the blood of any proscribed race.[36] The Amendment was ratified in due form by the legislature.[37] A protest by one member of the minority was entered as follows: "My constituents are opposed to this Amendment not because it gives the right of suffrage to the negro, but because by its adoption the State, under the operation of the second section, will surrender to the central Government the power to determine who shall be qualified electors in the State. The interests of the working people of the United States require the rejection of the Amendment, for, if it is adopted, the hundreds of thousands of Chinese being imported into this country by capitalists for the purpose of obtaining cheap labor, will be controlled by their employers and their power as electors used to oppress the toiling millions of America."[38]

On May 4, 1869, Ohio rejected the Amendment. Another legislature was then elected, with a slight change in its political complexion. When this legislature assembled on January 3, 1870, Governor Hayes sent in a message recommending the ratification of the Amendment. He said: "The great body of that part of the people of Ohio who sustain the laws for the reconstruction of the States lately in rebellion believe that the Amendment is just and wise. Many other citizens who would not support the Amendment if it was presented as the inauguration of a new policy, in view of the fact that impartial suffrage is already established in the States most largely interested in the question, now regard the Amendment as the best mode of getting rid

[35] Report of Kansas Secretary of State, 1869, p. 11.
[36] Governor's Message, 1870, p. 9.
[37] Kansas House Journal, 1870, p. 135.
[38] Kansas House Journal, 1870, p. 137.

of a controversy which ought no longer to remain unsettled. Believing that the measure is right and that the people of Ohio approve it, I earnestly recommend its ratification."[39] The legislature then ratified the Amendment by the closest vote given by any State, there being but a margin of one vote in the Senate and of two in the House.[40]

The same procedure of rejection and subsequent ratification took place in Georgia. On March 10, 1869, Governor Bullock's message on the subject was read in both houses. "Were there any doubt," he said, "as to the sufficiency of this Amendment to confer equal political privileges without regard to race or color, or were it urged that the right to vote did not necessarily include the right to hold office, it would certainly be dissipated and answered by the arguments advanced in the debates in Congress on the passage of the joint resolution proposing the Amendment, as well as by the expressed opinions of the soundest lawyers of the Nation. . . . If we ratify this Amendment, to be consistent we must at once voluntarily yield to colored citizens the right to have their voices heard in your halls. . . . Its adoption by the Nation will be the consummation of the progress of the last eight years towards perfect accord between the theory of republicanism and its practical enforcement."[41]

Governor Bullock thus publicly recommended ratification, but he was accused of privately opposing it.[42] On the day after his message was read, the House passed a resolution of ratification.[43] The opposing members protested that the Amendment destroyed the rights exercised by the States since the foundation of the Government. It was a concession on the part of the people North and South that they had no right to determine the question of suffrage. It was a concession by Congress that the reconstruction acts were unconstitutional. It invested Congress with the power to

[39] Ohio Executive Documents, 1869, Part I, p. 339.
[40] Ohio Senate Journal, 1870, p. 44. House Journal, 1870, p. 88.
[41] Georgia House Journal, 1869, p. 577.
[42] The New Era (Atlanta), March 26, 1869.
[43] Georgia House Journal, 1869, p. 602.

confer suffrage on all men in the States irrespective of race.[44]

In the Senate the resolution ratifying the Amendment was rejected by a curious combination. Thirteen members voted in favor of ratification, of whom eight were Republicans and five Democrats. Sixteen members voted against it, of whom seven were Republicans and nine Democrats. There were eight Republicans absent and dodging a vote. Thus the Amendment was slaughtered in a Republican Senate after its passage by a Democratic House.[45]

The Nebraska legislature ratified the Amendment without debate on February 17, 1870.[46] Governor Butler, in his annual message, had urged this action on the ground that the right to vote could be secured to the freedmen only by embodying it in the Federal Constitution, where it would be forever placed beyond and above the changes which might occur in the public opinion of particular localities.[47]

When news of the passage of the Amendment reached Minnesota, but before any official information had been received, a resolution was introduced into the House declaring that by the adoption of the Amendment the States would indicate their willingness to surrender to the United States and to Congress the dearest and most essential element of their sovereignty and to reduce themselves to the condition of mere provinces of a centralized government, contrary to the principles, intent, and letter of the Constitution.[48] An attempt was made to induce the legislature to ratify on mere telegraphic information, but it adjourned without having done so. The following year, however, it ratified immediately upon assembling, at the suggestion of Governor Marshall, who characterized the Amendment as the "crowning Act of Reconstruction."[49]

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[44] Atlanta dispatch to New York Herald, March 12, 1869, p. 7.

[45] New York Herald, March 20, 1869, p. 7. Georgia did not finally ratify until the following year. House Journal, 1870, p. 76. Senate Journal, 1870, p. 71.

[46] Nebraska Senate Journal, 1870, p. 18. House Journal, 1870, p. 21.

[47] Nebraska House Journal, 1870, p. 11.

[48] Minnesota House Journal, 1869, p. 134.

[49] Minnesota Senate Journal, 1870, pp. 9, 21. House Journal, 1870, p. 29.

The Amendment was rejected by those States having a considerable population which would be enfranchised in the first instance by the operation of the Amendment. These States were the border States of Delaware, Maryland, Kentucky, and Tennessee, and the Pacific Coast States of California and Oregon.

The legislatures of Delaware and Kentucky rejected the Amendment almost immediately after its proposal. In Delaware this action was taken on the ground that its adoption would subvert the Constitution and Government of the United States; would have a tendency to destroy the rights of the States in their sovereign capacity as States; and would deprive them of the right to regulate their own affairs and to establish the laws regulating the suffrage of their own citizens for their own offices.[50]

The Kentucky legislature rejected the Amendment by an overwhelming majority.[51] The reasons for this action were stated to be that the effect of the proposed change would be to subvert the structure of the federative system of government under which the country had been so signally blessed. It would obliterate the division between the delegated powers vested in the Government of the United States and those vested in the States. Its purpose was to annihilate the state governments. It would take from them powers expressly vested and reserved, and by abrogating the partition between the federal and state governments, would utterly destroy the equilibrium of the entire system. The result would necessarily be a consolidated central government with the States as mere abject appendages. The Amendment would destroy and supersede the original sovereign power of the several States by depriving them of rights essential to their preservation as States. It would elevate the Federal Government to the absolute and supreme authority in the federal system, and would endanger the

[50] Delaware Session Laws, Vol. XIII, Chap. 555. The House rejected by a vote of 19 to 0 (House Journal, 1869, p. 556). Senate rejected by 6 to 2 (Senate Journal, 1869, p. 410).

[51] Kentucky House Journal, 1869, p. 776. Senate Journal, 1869, p. 628. Vote: House, 80 to 5; Senate, 27 to 6.

very existence of the state governments, by destroying powers which the States had reserved to themselves as self-protecting checks upon federal usurpation.[52]

The minority, who voted against rejection, based their action upon the following grounds: (*a*) if the Amendment was not adopted, Kentucky's representation in Congress and in the Electoral College would be cut down; (*b*) colored citizens would never be allowed to enjoy their civil rights so long as the right to vote was denied them; and (*c*) state regulation of the suffrage, producing great inequality in the different States, would cause trouble if allowed to continue.[53]

In his message of October 13, 1869, Governor Senter of Tennessee urged the legislature to ratify the Amendment on the ground that its purpose was not to confer special immunities upon the negroes, but to prevent them from being deprived of their privileges, and to afford them the rights of citizenship and equality before the law in every part of the land. On grounds of expediency, he argued, if the objections to colored suffrage were founded in truth, might not those who were immediately charged with the interests of States where it existed, rationally protest against concentration of the evil upon them to the exemption of States where it did not exist?[54]

In spite of the governor's arguments, both houses rejected the Amendment.[55] In the House the majority of the Committee on Federal Relations, to whom the governor's message had been referred, made a report recommending rejection on the following grounds:—

(*a*) There was no necessity for it. The States were fully empowered by the Constitution as it stood to extend the suffrage to any and all.

(*b*) The Amendment had been passed and submitted at a time when the public mind was not in a condition to weigh

[52] Kentucky House Journal, 1869, p. 746.
[53] Kentucky Senate Journal, 1869, p. 624.
[54] Tennessee Senate Journal, 1869–70, Appendix, pp. 8–16.
[55] Tennessee House Journal, 1869–70, p. 193. Senate Journal, 1869–70, p. 443.

and consider it with the calmness and deliberation that its importance required.

(*c*) Its adoption was sought by the least popular method known to the Constitution, while it was designed to accomplish a great and radical change in the nature and principles of our form of government.

(*d*) It was class legislation of the most odious character. It singled out the colored race as its special wards and favorites.

(*e*) It was inexpedient because it would become a bone of contention for all future time, and the subject of ceaseless agitation in the halls of Congress and before the people. One Congress would think one mode of legislation appropriate to enforce it and another a different mode, and the result would be unlimited confusion.

(*f*) The Amendment would lead inevitably to a concession of all sovereign power to the legislative branch of the Federal Government, and was consequently destructive of states' rights and conducive to consolidation and despotism.[56]

The minority of the Committee on Federal Relations recommended ratification on the ground that the right of suffrage ought not to be left to the whim and caprice of local legislation. It should be secured and regulated by the supreme law of the republic, where it would not be disturbed by local prejudices and popular agitation. The Amendment would accomplish this object and would be a great stride in the inevitable tendency of the times toward universal manhood suffrage.[57]

In his annual message of 1870 to the Maryland legislature Governor Bowie declared that the Amendment was a usurpation of power on the part of Congress, since not all the States had had a voice in proposing it. The great evil of the Amendment, he said, was that it abridged the power of the States over a matter the control of which was necessary to their proper organization and efficiency. It might be found necessary, in order to protect from unjust taxa-

[56] Tennessee House Journal, 1869, pp. 185–6.
[57] Ibid., pp. 186–8.

tion a given description of property located chiefly or exclusively in one district of a State, so to limit the suffrage as to prevent those who inhabited a different section of the same State and did not possess the same description of property from taxing it unduly. But how was this to be accomplished without that full control over the right of suffrage then enjoyed by the States, which the Amendment proposed to take from them? The control of the suffrage lay at the foundation of all those powers that constituted state sovereignty. It was practically the sovereign power of the State, for without it no State could exercise those powers of local government that the framers of the Constitution intended it to exercise. For these reasons, he recommended the rejection of the Amendment.[58] The legislature then rejected it by a unanimous vote in both houses.[59]

The legislature of Oregon did not consider the Amendment until late in 1870, but then rejected it by substantial majorities in both houses.[60] In the Senate the following resolution of rejection was passed: "Whereas, the State of Oregon by admittance into the Federal Union was invested with the right to declare what persons should be entitled to vote within her boundaries, and until she, by her voluntary act surrenders that right, Congress has no authority to interfere with the conditions of suffrage within her boundaries: Resolved, that the Fifteenth Amendment is an infringement upon popular right, and a direct falsification of the pledges made to the State of Oregon by the Federal Government."[61]

In California the elections of 1869 for governor and members of the legislature were largely carried on the issue of the rejection or ratification of the Amendment. The Democratic convention met June 29, and adopted a platform

[58] Documents of the Maryland House of Delegates, 1870, Doc. A, pp. 61-70.

[59] Maryland Senate Journal, 1870, p. 291. House Journal, 1870, p. 268.

[60] Oregon House Journal, 1870, p. 512. Senate Journal, 1870, p. 654.

[61] Oregon Senate Journal, 1870, p. 654.

of which the leading plank was as follows: "Resolved, that we are opposed to the adoption of the proposed Fifteenth Amendment . . . believing the same to be designed and if adopted, certain to degrade the right of suffrage, to ruin the laboring white man, by bringing untold hordes of pagan slaves . . . into direct competition with him; to build up an aristocratic class of oligarchs in our midst, created and maintained by Chinese votes; to give the negro and Chinaman the right to vote and hold office; and that its passage would be inimical to the best interests of our country; in direct opposition to the teachings of Washington, Adams, and Jefferson; in flagrant violation of the plainest principles upon which the superstructure of our liberties was raised; subversive of the dearest rights of the different States, and a direct step toward anarchy and its natural sequence, the erection of an empire upon the ruins of constitutional liberty."[62]

The corresponding plank in the Republican platform declared that the negro question had ceased to be an element in American politics, and that the adoption of the Amendment ought to be followed by an act of universal amnesty.[63] In the elections which followed the Democrats secured the governor and a substantial majority in both houses of the legislature. This result caused the leading Republican newspaper in the State to express the hope that the Republicans in Congress would drop the race question.[64]

When the new legislature assembled early in 1870, both houses promptly rejected the Amendment.[65] Governor Haight, in his message recommending this action, said: "It is well to understand, at the outset, that the issue is not, what classes ought or ought not to be entrusted with the elective franchise, or whether, under any circumstances, race should or should not debar any from the exercise of

[62] McPherson, History of Reconstruction, p. 479.
[63] Ibid., p. 478.
[64] San Francisco Morning Bulletin, February 18, 1870, p. 4.
[65] California Assembly Journal, 1870, p. 295. Senate Journal, 1870, p. 245.

this privilege. All this is a proper subject for consideration and settlement by the people of a State when they frame their organic law, but is not necessarily involved in considering the proposition submitted by Congress, which is to restrict the people of the several States from exercising their own independent judgment upon the subject. Whether, therefore, Chinese and Indian suffrage is expedient is not directly an issue at present, but the question is, whether the Federal Constitution ought to be so amended as, on the one hand, to prevent the people of each State from excluding either of these races from the ballot box if in their judgment such exclusion is necessary, and on the other, to give Congress the power to place other restrictions upon the exercise of suffrage without the assent of the State legislatures; in other words, whether suffrage should be controlled and regulated by each State for itself or controlled, enlarged and restricted by Congress alone.

" Keeping, therefore, the issue separate from collateral ones, two questions are presented in the proposition. The first is a question of power, and the second one of policy. If it is not in the power of Congress, in conjunction with three-fourths of the States, to take from any State without its consent a right reserved at the formation of the Constitution; in other words, if to deprive a State of a distinct right, originally reserved, is not within the purview of the clause relating to amendments, then of course the proposed Amendment must be rejected. And if it is in conflict with sound policy, the same result ought to follow.

" The very idea of amendment involves the pre-existence of something to be amended and in this case, the proposition is to amend the powers originally delegated by depriving the States of a right reserved . . . It was clearly understood that a reserved right was one entirely withdrawn from the operation of any and every clause of the Federal Constitution, including the amending clause. It seems clear, then, that if the proposed amendment went through the forms of adoption it would be a mere *brutum fulmen,* destitute of any validity whatever. Aside, however, from the legal questions

involved, the objections to the proposition on the score of public policy seem unanswerable. To say that the people of California should tie their hands upon this subject, is to charge upon them either incompetency to comprehend what is expedient and just to those within her jurisdiction, or unwillingness to be governed by justice and sound policy. It would require some boldness for any one to come before the people of this State with such a charge and if the people are competent to determine whether any, and what, restrictions should be placed upon the elective franchise, it is difficult to discover any plausible reason why they should surrender the power of determination to a Congress of which they elect but five members in both Houses. It is fair to presume that the people of this State understand their duties and interests in reference to this subject quite as well as they are understood by the people of the States east of the mountains.

"If this Amendment is adopted, the most degraded Digger Indian within our borders becomes at once an elector and, so far, a ruler. His vote would count for as much as that of the most intelligent white man in the State. In this event, also, by a slight amendment to the naturalization laws, the Chinese population could be made electors."

The declaration in the Amendment that certain specified restrictions should not be placed upon the elective franchise by the United States was thought by Governor Haight to leave the inference open that any other restriction might be so placed. The restriction of the United States to act in one direction recognized their right to act in any other, and would place, therefore, the whole subject under congressional control. Whatever might have been the motive for selecting the phraseology, the danger was apparent that an implication would be founded upon it to take from the States all power to resist federal interference with suffrage.

"There is," Governor Haight continued, "no plausible argument, therefore, in favor of this Amendment which can be addressed to the people of this State. On the contrary, every consideration of legal right and public policy makes

against it. Nothing could be more loose and objectionable than the clause which authorizes Congress to enforce the restraint upon the States by appropriate legislation. Who is to judge of what is appropriate? Under this phraseology, Congress is made the exclusive judge; and if it declares any particular measure enacted by that body to be appropriate, it would claim that, upon rules of construction, no tribunal would have the right to revise its discretion. Congress, then, under the guise of professedly appropriate legislation, could enact almost anything which a fertile imagination might suggest."[66]

On March 30, 1870, the secretary of state issued a proclamation announcing that the requisite number of States had ratified the Amendment and that it had become a part of the Constitution.[67] Three of the States that he named as having ratified—Virginia, Mississippi, and Texas—were required to do so as a condition precedent to readmission to representation in Congress.[68] Since they ratified under duress, some question might be raised as to the validity of their ratifications. The question, however, is an entirely unpractical one, for no court of law would undertake to pass upon it.

The final adoption of the Amendment was brought to the attention of Congress and the country by President Grant in a special message. "A measure," he declared, "which makes at once four millions of people voters (sic), who were heretofore declared by the highest tribunal in the land not citizens of the United States . . . is indeed a measure of grander importance than any other one act of the kind from the foundation of our free government to the present day . . . It completes the greatest civil change, and constitutes the most important event that has occurred since the nation came into life."[69]

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[66] California Senate Journal, 1869–70, pp. 144–52. It was pointed out that the governor's theory of the amending power was one upon which no amendment at all would be possible. See San Francisco Morning Bulletin, January 8, 1870, p. 4.

[67] Documentary History of the Constitution, Vol. II, p. 893.

[68] 16 Stat. at Large, 41.

[69] Richardson, Messages and Papers, Vol. VII, p. 55.

CHAPTER V.

Enforcement Legislation.

In addition to the debates in Congress at the time the Amendment was proposed to the States, another obvious medium of congressional interpretation is found in the legislation passed to enforce it. As we have seen, the first section of the Amendment was, in one respect, a compromise between the nationalistic and the local autonomic principles. The real character of that compromise was to be determined by the practical interpretation to be placed upon the second section, for upon the actual operation of that section depended to a large extent the question whether the Amendment should become almost wholly nationalistic in tendency, or should leave the matter of suffrage almost entirely with the States.

The second section was thus preeminently the uncertain element in the Amendment, and in regard to the amount of power conferred by it upon Congress opinions differed almost as widely as the poles. The strict constructionists held that this section conferred upon Congress no power of affirmative legislation.[1] The Amendment, they said, was self-executory, or, in other words, the courts would enforce it. The Constitution was the supreme law of the land, and the judges in every State were bound thereby. Even by the most liberal construction appropriate legislation for the enforcement of the Amendment would consist in merely declaring what acts should be considered void for conflict, and in providing the proper judicial machinery by which cases involving the Amendment might be instituted in the federal courts.[2] Even this power, it was held, was

[1] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, p. 353.

[2] Thurman of Ohio, Globe, 41st Cong., 2d sess., p. 3663; Davis of Kentucky, Globe, 42d Cong., 1st sess., p. 648; Casserly of California, Globe, 41st Cong., 2d sess., Appendix, p. 472.

not an isolated, independent power to be exercised at will, but was only a secondary power to be used in reference to the contingency contemplated by the primary provision. It was a latent power and must forever remain so, in a constitutional sense, until warmed into activity by hostile acts. Hence, until the Amendment should be violated, Congress could not exercise the power conferred upon it.[3] It was denied, moreover, that the express grant of power to Congress gave that body more power than it would have had without such grant, either because it was a mere repetition of the power already granted in the "sweeping clause" of the Constitution,[4] or because the general Government was necessarily invested with power to correct infractions of the provisions of the Constitution.[5]

The words "shall not be denied" in the Amendment might be construed retroactively so as to repeal all state laws or constitutional provisions containing such denial that were in existence at the time the Amendment was adopted, but, grammatically, the words did not necessitate such an interpretation, and might plausibly be held to relate only to future acts of denial. The theory was even put forth in certain quarters that, as long as the constitution of a State remained formally unchanged, it was to be enforced in all its provisions by the state officers until they should receive official notification from proper authority that they were to disregard it. In other words, the Amendment was not to be considered as having effect in any State until the legislature should make the laws of the State conform to it, or until Congress should pass laws to enforce it. This contention was, of course, not admitted, but it was referred to as one reason why Congress should pass enforcement legislation.[6] Moreover, it was feared that, on account of the well-known hostility of the people and of the courts in some of the States to the Amendment, it would not execute itself

[3] Vickers of Maryland, Globe, 41st Cong., 3d sess., p. 1635.
[4] Thurman of Ohio, Globe, 41st Cong., 2d sess., p. 3663.
[5] Vickers of Maryland, Globe, 41st Cong., 3d sess., p. 1636; cf. Prigg vs. Commonwealth of Pennsylvania, 16 Pet. 539.
[6] Sherman of Ohio, Globe, 41st Cong., 2d sess., p. 3568.

without ancillary legislation. The express authorization given Congress to enforce indicated that the framers had contemplated that without such legislation it would not have the full force and sanction of law.[7]

In opposition to the view that a mere judicial remedy for violation of the Amendment would be sufficient, the broad constructionists declared that the mere right of appeal from the state to the federal courts would be a very imperfect remedy, because the plaintiff might often be unable to pursue it. The framers of the Amendment had not intended to leave the injured person to that roundabout and costly process. Even if the victim should take an appeal and the state statute under color of which he was injured should be declared unconstitutional, the perpetrator would go unpunished. The right secured by the Amendment could be adequately protected only by penal enactments, and it was the intention of the framers that it should be so protected.[8] Under this interpretation of the enforcement section Congress might not only provide that cases arising under the provisions of the Amendment might be carried up on appeal from the state tribunals to the federal courts, where conflicting state laws would be declared unconstitutional, but might also provide for the punishment of all persons who should invade the right secured by the Amendment.[9] In general, the view of the broad constructionists was that appropriate legislation was any legislation adequate to meet the difficulties encountered, to redress the wrongs existing, to furnish remedies and inflict penalties adequate to the suppression of all infringements of the right secured by the Amendment. They went to the farthest extreme when they declared that Congress itself must be the sole judge of what was necessary and proper to enforce the Amendment.[10]

Whether the majority in Congress took the view of the

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[7] Globe, 41st Cong., 2d sess., p. 3568.

[8] Morton of Indiana, Cong. Record, 43d Cong., 1st sess., Appendix, p. 360.

[9] Garfield of Ohio, Globe, 42d Cong., 1st sess., Appendix, p. 153.

[10] Wilson of Indiana, Globe, 42d Cong., 1st sess., p. 483; Davis of New York, Globe, 41st Cong., 2d sess., p. 3882.

broad constructionists or that of the strict constructionists is clearly indicated by the legislation actually passed by that body. The first and only act passed for the direct purpose of enforcing the Fifteenth Amendment was that of May 31, 1870. A bill, however, designed to effect the same object had passed the House on May 16 by a vote of 131 to 43.[11]

This bill was entitled "A bill to enforce the right of citizens of the United States to vote in the several States . . . who have hitherto been denied that right on account of race, color, or previous condition of servitude." The first section subjected to fine and imprisonment any officer of the United States or of any State, Territory, county, municipality or ward, who should deny or abridge, by any official act or by failure to perform any official duty, whether under color of any state constitution or law or of any local or municipal ordinance, the right of any citizen of the United States to vote, on account of race, color, or previous condition of servitude, at any federal, state, county, or municipal election.

The second section declared that all colored citizens of the United States resident in the several States should be entitled to vote at all elections in the State, county, town, or ward of their residence, subject only to the same conditions required to qualify white citizens to vote therein. It also subjected to fine or imprisonment any person who should prevent from voting, by force, fraud, intimidation, or other unlawful means, any colored citizen possessing the qualifications, except in respect of color, requisite to enable a white citizen to vote.

The third, fourth, fifth and sixth sections provided that, in case the constitution or law of any State should require the assessment or payment of a tax as a qualification of an elector, no discrimination should be made against colored citizens by any assessor authorized by the laws of the State to make such assessment, or by any member of any levy court authorized by state law to correct assessments or levy taxes, or by any clerk required by state law to record or

[11] House Journal, 41st Cong., 2d sess., p. 798.

transcribe lists of persons assessed, or by any tax collector, elected or appointed under the laws of any State. Every such officer who should thus discriminate against colored citizens was made liable to pay heavy damages to any person who should sue for the same, and was also made subject to fine and imprisonment.

The seventh and eighth sections prohibited, under pain of forfeiture, fine, and imprisonment, discrimination against any colored person (on account of his race, color, or previous condition of servitude) having the qualifications of a white citizen, on the part of any inspector or judge of election authorized to receive votes, or of any registration officer authorized to make lists of persons entitled to vote, or of any member of any board authorized to admit persons to the elector's oath or to the privileges of an elector.

The last section provided that the circuit courts of the United States should have jurisdiction of civil cases and the circuit and district courts of criminal cases arising under the act.[12]

When this bill reached the Senate, after having passed the House, it became the subject of controversy, not only between the two parties, but also between the different factions of the dominant party. The minority were opposed to the passage of any bill on the subject, but, knowing that some bill would be passed, they were inclined to support the House bill as the least objectionable that could be obtained. They intimated that the first section of that bill was all that it was expedient or necessary to pass. If it were amended by inserting a few words to include the case of a refusal to register or to place upon the poll list, or to assess or allow payment of a tax, whenever required before voting, it would contain all that could properly be claimed as within the power of Congress under the Fifteenth Amendment.[13]

Objection was made to the House bill by Senator Stockton of New Jersey on the ground that, with the exception

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[12] Text of House bill in Globe, 41st Cong., 2d sess., pp. 3503–4.

[13] Casserly of California, Globe, 41st Cong., 2d sess., Appendix, p. 474.

of the first section, it provided for the protection of colored citizens only. It left unpunished the man who interfered with the rights of the white citizen, thus making a distinction against the white man on account of his race or color. The Fifteenth Amendment, he held, provided not only for the protection of the colored people, but also forbade Congress to protect the colored man to the exclusion of the white man. Hence, he concluded, the bill would not enforce but would violate the Amendment.[14] In general, however, the minority were inclined to concede that, with more careful wording in certain particulars, the bill would conform substantially to the provisions of the Amendment.[15]

The bill was also unsatisfactory to certain members of the majority in the Senate. Williams of Oregon pointed out that this legislation undertook to occupy a new field, which had not hitherto been entered by Congress. The laws of a large number of States were to be modified, or perhaps repealed, by this legislation. It therefore behooved Congress to do only what the actual necessities of the case required. The House bill went as far as it was safe or prudent to go at that time. It provided remedies for all existing evils, and if experience should demonstrate that it was in any respect defective, if any state legislature should devise any scheme to avoid its provisions, it could be amended so as to meet the new emergency.[16]

This view, however, did not commend itself to the majority in the Senate. The House bill, they held, was entirely inadequate to cope with the situation. It was an excellent recipe for pretending to do something without accomplishing anything of importance.[17] In the first place, it did not forbid mobs from interfering with colored voters going to register. If they were thus prevented from registering, there was no remedy under the bill, and their votes would

[14] Globe, 41st Cong., 2d sess., p. 3567.
[15] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, p. 361.
[16] Globe, 41st Cong., 2d sess., pp. 3656–7.
[17] Carpenter of Wisconsin, ibid., p. 3563.

be lost. In the second place, it provided only for the two cases in which registration or the payment of taxes should be required before voting. A hundred other prerequisites which the bill did not cover might be invented by the States. In the third place, it merely made certain offenses punishable in the United States District Courts. But who was to be the prosecutor? There was only one such court and one marshal in a State. The bill did not undertake to increase the number of prosecuting officers, or to provide any adequate machinery for its enforcement.[18]

With these defects, the belief was expressed that the bill, if it became a law, could not possibly succeed. In some States it would have to go into effect against hostile public opinion, and against the opinion of a large majority of the judges and jurymen. It was said that the situation of political affairs at the South showed conclusively that some stringent law was necessary to neutralize the deep-seated hostility of the white race to negro suffrage.[19] In order to accomplish the end in view of securing to the colored people their constitutional rights, it would have to be a law that would, so to speak, stand special demurrers, and reach to every possible method of evasion that might be invented.[20]

A bill that was believed to meet these requirements was reported by the Senate Judiciary Committee on April 25, 1870; after being amended in certain respects, it passed the Senate on May 20 by a strict party vote of 43 to 8.[21] The House refused to concur in the action of the Senate, and a conference committee was appointed to adjust the difference between the two bodies. This committee rejected the House bill entirely, and made a report recommending the passage of the Senate bill with a few slight modifications.[22] This report was agreed to by the Senate on May 25 by a vote of 48 to 11,[23] and two days later by the House, the vote

[18] Stewart of Nevada, ibid., p. 3658.
[19] Townsend of Pennsylvania, ibid., Appendix, p. 392.
[20] Edmunds of Vermont, Globe, 41st Cong., 2d sess., p. 3519.
[21] Senate Journal, 41st Cong., 2d sess., p. 685.
[22] Globe, 41st Cong., 2d sess., p. 3752.
[23] Senate Journal, 41st Cong., 2d sess., p. 704.

being 133 to 58.[24] On May 31 the bill, in the form reported by the Conference Committee, became a law, as far as Congress and the President could make it such.

This law was entitled "An Act to enforce the right of citizens of the United States to vote in the several States of the Union, and for other purposes." The first section declared that all citizens of the United States, otherwise qualified by law to vote at any election in any State, Territory, county, school district, or municipality, should be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude, any constitution, law, custom, or regulation of any State or Territory to the contrary notwithstanding.[25] This section was merely the declaration of a right, without the addition of any penalty for its violation.

The second section of the Act provided that if, under the constitution or laws of any State or Territory, any act is required to be done as a prerequisite for voting, and, by such constitution or laws, persons or officers are charged with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite, it should be the duty of every such person and officer to give to all citizens of the United States an equal opportunity to perform such prerequisite without distinction of race, color, or previous condition of servitude. It further provided that if any such person or officer should refuse or knowingly omit to give full effect to this section, he should be liable to forfeit heavy damages to the person aggrieved thereby, and should also be subject to fine and imprisonment.

The third section provided that whenever, under the constitution or laws of any State or Territory, any act is required to be done by any citizen as a prerequisite to entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid should, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the

[24] House Journal, 41st Cong., 2d sess., p. 869.
[25] 16 Stat. at Large, 140.

duty of receiving or permitting such performance or offer to perform, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, should be entitled to vote in the same manner as if he had indeed performed such act. It provided also that any election officer whose duty it should be to give effect to the vote of any such citizen, who should wrongfully refuse or omit to do so upon the presentation by him of his affidavit stating the circumstances of such offer and that he was wrongfully prevented by such person or officer from performing such act, should for every such offense forfeit five hundred dollars to the person aggrieved thereby, with full costs and such allowance for counsel fees as the court should deem just, and should also be subject to heavy fine and imprisonment.[26]

The second section was designed to provide not only for the two prerequisites that had been mentioned in the House bill, but also for all others that might be evolved by the ingenuity of the States. But in making it broad enough to include so much, the language became so vague that members of both parties thought it too indefinite to found an indictment upon.[27] It was held that the offense made punishable by the section was not defined with sufficient clearness. In particular, the intent required in the commission of every crime was only remotely indicated. The words in the Amendment "on account of race," et cetera, constituted the intent of the offense, so that when a person should be indicted for violating the Amendment, there must be an act with an intent proved to the satisfaction of the jury before he could be convicted. It must be proved, first, that he refused to register the applicant, if that should be required as a prerequisite to vote, or that he refused him his right to vote; and secondly, it must be proved that the refusal was because of the character, in the respects specified in the Amendment, of the person offering to vote. The second

[26] 16 Stat. at Large, 140-1.

[27] Sherman of Ohio and Williams of Oregon, Republicans, Globe, 41st Cong., 2d sess., pp. 3579, 3656.

section of the act was held not to meet these requirements.[28]

As to the meaning of the third section, there was no unanimity of opinion among the members of either party. It was a disputed question whether it applied to all persons, or exclusively to colored persons. Some thought that it placed under the jurisdiction of the United States the act of every citizen who might approach a register or judge of election. Those in charge of the bill, however, declared that the word "aforesaid" referred back to the act of discrimination mentioned in the second section. In order that it might be more clearly indicated that the third section referred only to such discrimination, an amendment was offered to make the affidavit state that the affiant was "wrongfully prevented by such person or officer on account of race, color, or previous condition of servitude," but the amendment was rejected,[29] and this point was left in comparative doubt.

It was openly declared by men of both parties that the third section would to a considerable extent set aside the registry laws in nearly all the States. It was thought by some that the right protected by the Amendment was not the right to be registered under any system of state registration, or to be taxed preparatory to voting under state laws, but only the naked right to vote without distinction of race or color. If so, the second and third sections were entirely unconstitutional.[30] Others held that, even though the right to be registered might reasonably be implied in the right to vote, it was inexpedient to set aside state regulations on the subject. In many States there were laws which provided ways and means by which persons might secure the right to vote in case they were prevented from being registered. But all these would be entirely swept away by the provision that the applicant's affidavit should be conclusive evidence that he had been wrongfully rejected.[31]

A criticism that was advanced against both the second

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[28] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, pp. 357-8.
[29] Globe, 41st Cong., 2d sess., p. 3688.
[30] Kerr of Indiana, ibid., p. 3872.
[31] Williams of Oregon, ibid., p. 3657.

and third sections was that in them Congress undertook to regulate and enforce the powers, duties, and functions of officers created under state authority, deriving their sole commission to act from the State, and responsible solely to the State by which they were chosen or appointed.[32] The decision of the Supreme Court in the case of Prigg vs. Pennsylvania[33] was cited as showing that there was a well-defined separation between federal and state officers and a thorough independence on the part of each in the discharge of their respective duties under their several governments.[34] It was denied that a provision in a federal statute declaring the non-execution of state laws by state officers to be a penal offense would authorize such penalties to be inflicted by the federal courts. In the Amendment there was no warrant authorizing Congress to pass a law requiring the officers of a State to execute the laws of that State under the penalty of punishment inflicted by Congress.[35]

To this contention it was replied that Congress could undoubtedly require state officers to discharge duties imposed upon them as such officers by the Federal Constitution, and might punish under federal law the state officer who violated a duty laid upon him by the Constitution. The federal courts were said to have repeatedly held that they could require municipal and county officers to perform the duties imposed upon them by state laws in levying taxes when such taxes became necessary to collect a judgment in their courts against such city or county, although all the powers and authority of such officers were derived from state laws. Could not Congress, it was queried, go as far in requiring state or county officers to perform those official duties, or at least those ministerial acts, which protect a citizen in the enjoyment of his constitutional rights, as it can in compelling the discharge of those which merely secure the enforcement of a legal obligation? Since the

[32] Thurman of Ohio, ibid., p. 3485.
[33] 16 Pet. 539.
[34] Hamilton of Maryland, Globe, 41st Cong., 3d sess., Appendix, p. 210.
[35] Davis of Kentucky, Globe, 41st Cong., 2d sess., p. 3667.

violation of a constitutional prohibition by a State could be consummated only by the officers through whom the State acts, there could be no more appropriate legislation for enforcing the prohibition than to compel state officers to observe it.[36]

Although the argument against imposing duties on state officers by federal law was based ostensibly on constitutional grounds, the real objection to it was that it was inexpedient. If it were once admitted that Congress could punish the violation of a law, it would seem to be an unavoidable consequence that Congress itself could pass that law. The principle once conceded, there would seem to be no barrier between Congress and the complete regulation and control of the entire machinery of elections in the States.

The third section of the act was a legal fiction, inasmuch as it was intended to secure the right to vote to those who were not actually registered. A still more audacious legal fiction was contained in the twenty-third, or contested election, section. It provided that whenever any person should be defeated or deprived of his election to any office, except elector of president or vice-president, representative in Congress, or member of a state legislature, by reason of the denial to any citizen who should offer to vote of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office and the emoluments thereof should not be impaired by such denial; and such person might, in order to recover possession of such office, bring suit in the federal circuit or district courts, which were, in such cases, to have concurrent jurisdiction with the state courts.[37]

By the operation of this section a contesting candidate might be seated and declared elected by means of votes which had never been cast. Its effect would be to secure an office to one person by means of the intention of another

[36] Burchard of Illinois, Globe, 42d Cong., 1st sess., Appendix, p. 314. Cf. Ex parte Siebold, 100 U. S. 371.
[37] 16 Stat. at Large, 146.

person to perform an act which, in fact, he had never performed. In this respect it was a novelty in the history of American legislation.

That technical objection might be made to this section was admitted, but it was maintained that it was designed to enforce and secure not merely the observance of the letter, but the accomplishment of the spirit and object of the Fifteenth Amendment. That article of the Constitution clothed Congress with ample power to secure the end to be accomplished. If it gave Congress any authority to legislate on the subject at all, such legislative power must, by necessary implication, be sufficiently extensive to authorize the passage of a law effectuating the purpose in view, namely, securing to the colored man the right to vote, and the right to have the man for whom he votes hold the office, provided he should have received a majority of all the votes cast if the colored man had been permitted to cast his vote. It would not be enough merely to punish the man who denies the colored man the right to vote after the offense has been committed. That would not carry the object of the Amendment into execution. In order to effect the full purpose of the Amendment, the colored man must be given not only the right to vote, but the right to have his vote counted and made effective.[38]

This section, however, found few supporters, many members of the dominant party considering it both inexpedient and unconstitutional. It was pointed out that in practically all the States some statutory provision was made for determining the right of an incumbent to the office of which he has possession. Never before had the claim been made that Congress had any authority to interfere with these universally practiced state remedies.[39] But the strongest objection to the section was that there was no constitutional basis for it. The Amendment provided for protecting persons in the right to vote, but not for deciding contested

[38] Carpenter of Wisconsin, Globe, 41st Cong., 2d sess., pp. 3563, 3680.

[39] Howard of Michigan, ibid., p. 3654.

elections. To secure to A B his right to vote by proper remedies was doubtless a legitimate exercise of the power invested in Congress by the Amendment. But to secure to C D the indirect benefits to be derived from the constructive exercise by A B of his right to vote was not warranted by the Amendment, and was trenching on dangerous and uncertain ground.[40]

The substantive provisions of the Act that were expected to prove most effective in securing to the colored man the actual exercise of his right to vote were those contained in the fourth, fifth, sixth and seventh sections.

The fourth section provided that if any person or combination of persons, by force, bribery, or threats, should delay any citizen in doing any act required to be done to qualify him to vote or should prevent him from voting at any election, such person or persons should be subject to forfeiture, fine, and imprisonment.

The fifth section provided that if any person should attempt to hinder, control, or intimidate any other person to whom the right of suffrage was secured or guaranteed by the Fifteenth Amendment from or in exercising that right by means of bribery, or threats of depriving such person of employment, or of ejecting such person from house or land, or by threats of refusing to renew labor contracts, or by threats of violence to himself or family, the person so offending should be subject to fine or imprisonment.

The sixth section provided that if two or more persons should conspire together, or should go in disguise upon the public highway or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen for the purpose of hindering his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons should be held guilty of felony and be subject to heavy fine and imprisonment.

[40] Morton of Indiana, Globe, 41st Cong., 2d sess., p. 3681; Trumbull of Illinois, ibid., p. 3570.

The seventh section provided that if, in the act of violating any provision in the two preceding sections, any other crime should be committed, the offender should be visited with such punishments as were attached to such crimes by state law.[41] Sections from the eighth to the thirteenth, which were borrowed from the Civil Rights Act of 1866, provided the federal executive and judicial machinery for carrying into effect the substantive provisions of the act.

These sections, as a whole, were obviously designed to put down mob violence shown in preventing persons from exercising the right to vote and from being registered. They were aimed especially at the operations of the Ku Klux Klan, and were included in the act because it was thought that the measure would be largely ineffective unless it provided against conspiracies and combinations of men organized for the purpose of contravening the right conferred by the Amendment.[42]

The action of Congress in incorporating into the act the sections designed to prevent the interference of private individuals with the exercise of the right to vote was the most important canon of interpretation placed by that body upon the Amendment. It was this interpretation which especially aroused the opposition of the minority. The latter held that, if the limitations of a written constitution were of any binding force, the power of Congress to legislate in execution of constitutional provisions could not be so exercised as to enlarge the scope and meaning of those provisions. The Amendment operated upon the States in their corporate capacity. It was based upon the implication that the States had full control, except as limited by the Amendment, in fixing the qualifications of voters. If a State should fix the prohibited qualifications, the only proper mode of redress would be for the law making such requirements to be declared unconstitutional by the courts, for the contention would hardly be made that Congress

[41] 16 Stat. at Large, 141.
[42] Pool of North Carolina, Globe, 41st Cong., 2d sess., pp. 3611-12.

could punish state legislators for exceeding their powers.[43]

The prohibition upon the States contained in the Amendment was declared to be similar in character and in legal effect to other restrictions upon the States found in the Constitution. The States, for example, were forbidden to enter into agreements with foreign powers, or to keep ships of war in time of peace; but this did not prevent private persons from building war-ships and making contracts with foreign States. The denial to the States of the power to coin money did not prevent persons having no official relation to the States from coining money, and did not authorize Congress to punish counterfeiters of the current coin of the United States. Hence, by parity of reasoning, the denial to the States of the power to abridge the right to vote on the specified accounts did not apply to private individuals, and did not authorize Congress to punish such individuals for interfering with voters.[44]

In regard to the coining of money, the framers of the Constitution had indicated their belief that the prohibition upon the States did not give Congress the power of affirmative legislation to punish counterfeiters by inserting the grant of this power in another clause of the Constitution. This express grant, however, could not be said to correspond, in the mode of its operation, with the enforcement section of the Amendment. There was a necessary difference in character between legislation by Congress to execute an express power exclusive in itself, and legislation to enforce a limitation of a general power exclusive in the States. In the former case Congress might claim a liberal construction in aid of its express exclusive power. In the latter case the State had a right to restrict Congress to the very terms of the prohibition.[45]

It was admitted that a State could act only through its officers or agents, and that Congress might require such

[43] Hamilton of Maryland, Globe, 41st Cong., 2d sess., Appendix, pp. 354–5.

[44] Thurman of Ohio, Globe, 41st Cong., 2d sess., pp. 3661–2.

[45] Casserly of California, Globe, 41st Cong., 2d sess., Appendix, p. 473.

persons to conform in their official actions to the provisions of the Amendment. But this was the farthest limit to which the operation of the Amendment and the power of Congress under it could possibly be extended. It was ridiculous to treat as the act of the State the act of any mere ruffian or breaker of the peace, acting on his own motion, who interfered with voters. A State did not act through its isolated and straggling citizens. There were always state laws for punishing in the state courts any person who should intimidate voters or interfere with the proper conduct of elections. Such persons, far from representing the State, were really acting in direct violation of the will of the State.[46]

In answer to the above objections the broad constructionists argued that, in order to ascertain the meaning and full scope of the Amendment, it must be interpreted in the light of the history of the times and of the social and political conditions that gave it birth.[47] The spirit and true intent of the Amendment, as indicated by the debates in Congress at the time of its passage by that body, and as understood by the country at large, was that the colored man should be placed upon the same level in regard to voting as the white man, and that Congress should have the power to secure him in the full enjoyment of that right. The attainment of this object necessarily involved the exertion of the power of Congress upon individuals.[48] It was admitted that the Amendment did not in terms relate to the conduct of mere individuals, and that some state courts might give it a strict and narrow construction by refusing to apply its real principles to the case of an individual, not acting under the authority of a State, who should undertake to deny to a colored man the exercise of his right of suffrage. But the protest was made that this construction would defeat the object in view in adopting the Amendment, would thwart the intention of its framers, and would strip it in large degree of that

[46] Ibid.
[47] Pratt of Indiana, Globe, 42d Cong., 1st sess., p. 505.
[48] Morton of Indiana, Globe, 41st Cong., 2d sess., pp. 3670–1.

remedial and protective justice which was in the minds of its authors when it was under discussion in Congress.[49]

In proposing the Amendment to the States, Congress had not intended to confine its operation to the prohibition of state legislation. Such an interpretation would nullify the enforcement section. That section was intended to enable Congress to take every step that might be necessary or proper to secure the colored man in the peaceful and free exercise of his right to vote. If the legislation of Congress was to apply only to States, it would be unnecessary, because the federal courts would hold hostile state enactments void. Congress could not indict a state officer as an officer, or pass a criminal law applicable to a State. But whenever the Constitution guaranteed a right it gave also the means of protecting it. Hence, in order to give any adequate force and meaning to the second section of the Amendment, it must be construed as applying to individuals, whether they were acting under the authority of a State, or on their own responsibility.[50]

In regard to the analogous prohibition upon States in the Fourteenth Amendment, the position was taken that the argument that acts of violence by private individuals were not state acts was more specious than real. Constitutional provisions were made for practical operation and effect, and must be understood as tending to accomplish the objects sought. If a State had no law upon its statute books obnoxious to objection under the Amendment, but nevertheless permitted the rights of citizens to be systematically trampled upon without color of law, of what avail was the Constitution to the citizen? The argument led to the absurdity that while the Amendment prohibited all deprivation of rights by means of state laws, yet all rights might be subverted and denied, without color of law, and the Federal Government would have no power to interfere. Nothing could be more evident than that, taking the prohi-

[49] Howard of Michigan, Globe, 41st Cong., 2d sess., p. 3655.
[50] Pool of North Carolina, Globe, 41st Cong., 2d sess., pp. 3611–13; Morton of Indiana, Globe, 42d Cong., 1st sess., Appendix, p. 251.

bition on the States together with the enforcement section, the intention was to enable Congress to secure to citizens the actual enjoyment of the right guaranteed.[51]

Affirmative legislation was not the only method of denial of a right by a State. This might be done as effectually by not executing as by not passing laws. If a State made proper laws and had proper officials to execute them, and an outsider undertook to step in and clog justice by preventing the state authorities from carrying out the constitutional provision, Congress had the right to make such interference an offense against the United States.[52] A systematic failure to make arrests, to put on trial, to convict or to punish offenders against the right of citizens, constituted a denial of such rights by the State. Whenever unlawful combinations to impair rights secured by the Constitution set at defiance the constituted authorities in any State, or when the authorities were in complicity with the offenders and failed to ask aid of the Federal Government in putting down the outlawry, such dereliction was a denial by the State of constitutional rights.[53] In general, a State which, having the power to prevent the violation of rights, omitted to secure them, did in fact deny those rights.[54] The Federal Government must remedy acts of omission on the part of the States, must fill in the gaps in the execution of state laws, and by its own laws and by its own courts must go into the States for the purpose of giving the Amendment practical vitality.[55]

The arguments thus advanced by the broad constructionists were based upon two ideas, (*a*) the Amendment is to be construed as prohibiting individuals acting suo motu from infringing the right thereby conferred, (*b*) the de-

[51] Lowe of Kansas, Globe, 42d Cong., 1st sess., p. 375.
[52] Poland of Vermont, ibid., p. 514.
[53] Colburn of Indiana, ibid., p. 459.
[54] Lawrence of Ohio, Cong. Record, 43d Cong., 1st sess., p. 412.
[55] Pool of North Carolina, Globe, 41st Cong., 2d sess., p. 3611. The doctrine that the failure of a State to protect rights guaranteed by the Constitution amounts to a denial of them was expressly incorporated into the Act of April 20, 1871, section 3. 17 Stat. at Large, 14.

linquency of a State in not protecting this right constitutes a virtual denial of it. Although, in the minds of many, these two ideas were probably considered as mutually dependent, yet the first idea was apparently put forward by some as a distinct proposition. It is doubtful, however, whether there had been any intention on the part of Congress in passing the Amendment that it should cover the acts of private individuals. Congress had undoubtedly intended it to secure the equal right of the colored man to vote, but had apparently expected that this object would be attained by laying a prohibition upon the States against infringing it. When, in the course of events, it became evident that this was not sufficient to effect the object of the framers, the doctrine then sprang up that the Amendment must be expanded so as to cover the new state of affairs. This doctrine was the result of the reaction of circumstances upon theories, and it possessed both the advantages and the drawbacks of such a basis.

The Act of 1870 belonged, on the whole, to that class of legislation which its friends call progressive and its enemies revolutionary. It was upheld, in general, as a means toward setting into motion some of the powers of Congress for the protection of voters, and asserting something of the authority and dignity of the nation.[56] It was based upon the idea that until the colored man should have reached the point at which he could compete evenly with the white man, his undeveloped powers must be reinforced by a system of protection applied to man such as had been applied to manufactures, its principle being government support in the struggle for existence as long as needed. But the prediction was made that, although this was theoretically an excellent idea, it would prove unworkable in practice on account of the laissez faire trend of thought and the prevalent detestation of paternalism.[57] Those who regarded the act as revolutionary based their contention upon its alleged lack of constitutional warrant, and upon the far-reaching results

[56] Stewart of Nevada, Globe, 41st Cong., 2d sess., p. 3807.
[57] New York Nation, February 18, 1869, p. 124.

that would flow from it. The Amendment had not been intended by its framers, or by the people, to deprive the States of the general control over elections, or to clothe Congress with the power to dictate in what manner they should be conducted.[58] Yet the act was declared to assert boldly the doctrine that Congress had been invested with the complete regulation and control of the entire machinery of elections in the States.[59] Such a result would tend to consolidate all power in a centralized despotism, and reduce the States to simple atoms in an empire.[60]

We may advert briefly, before concluding this chapter, to the subsequent career of the legislation passed by Congress to enforce the Amendment. The substantive provisions of the Act of 1870 relating to the Amendment became, with some changes in phraseology, sections 2004 to 2010 inclusive and sections 5506 to 5509 inclusive of the Revised Statutes. Of these, sections 2005 to 2010 inclusive and section 5506 were repealed by the Act of February 8, 1894,[61] and sections 5507 and 5508 have been declared not to be appropriate legislation for the enforcement of the Amendment.[62] Hence there remain only sections 2004 and 5509, being sections 1 and 7 respectively of the Act of 1870. Section 2004 is the declaration of a right, but provides no penalty for its violation. Section 5509 does not create a distinct offense, but merely provides for the punishment of crimes committed in connection with the offenses prohibited in the two preceding sections. The net result, therefore, is that the bulk of the enforcement legislation has been rendered inoperative, and what still remains in force possesses little vitality.

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[58] Kerr of Indiana, Globe, 41st Cong., 2d sess., p. 3872.
[59] Thurman of Ohio, ibid., p. 3662.
[60] Hamilton of Maryland, ibid., Appendix, pp. 355, 360.
[61] 28 Stat. at Large, 36.
[62] James vs. Bowman, 190 U. S. 127; Karem vs. United States, 121 Fed. 250.

CHAPTER VI.

JUDICIAL INTERPRETATION.

The final determination of the actual meaning and effect of the Amendment rests neither with Congress nor with the state legislatures, but with the courts. When the Amendment became a part of the Federal Constitution, all conflicting provisions in the constitution or laws of any State became inoperative, because the courts, both federal and state, would be bound to declare them void when called upon in the due course of legal proceedings. Hence, to this extent the Amendment was effective without the aid of legislation. But though the inherent force of the Amendment may reach far enough to invalidate conflicting laws and, under some circumstances, to restrain the acts of administrative officers, yet it cannot inflict penalties for the violation of the right conferred.[1] Hence, subsidiary legislation was necessary in order to give the Amendment full vitality. Thus the totality of force emanating from the Amendment is twofold: that which it has ex proprio vigore, and that which it exerts through ancillary legislation. The amount of force operating through each of these channels depends to a considerable extent upon the strictness or liberality of the construction placed upon each by the courts.

No case involving the Amendment was decided by the Supreme Court until six years after its adoption. During this interval a number of cases came up in the state and lower federal courts, and a certain amount of divergence was shown in the general attitude displayed toward the Amendment by these two sets of courts.

On April 5, 1870, a week after the proclamation by the secretary of state of the adoption of the Amendment, but before any legislation had been passed to enforce it, a mayor-

[1] Cf. United States vs. Hudson, 7 Cr. 32.

alty election was held at Leavenworth, Kansas, out of which grew the contested election case of Anthony vs. Halderman.[2] Anthony brought quo warranto proceedings in the Supreme Court of the State to oust Halderman, who had been seated, alleging that a number of negroes, sufficient to change the result of the election, had been wrongfully denied registration. The counsel for the defendant put forth an argument which, if it had been sustained, would have almost paralyzed the Amendment. He contended that it ought to be construed according to its language, and not in accordance with any supposed intent not shown on its face. The Amendment, he declared, did not purport to confer any right, but in effect merely prohibited the national or state governments from depriving, for any of the reasons therein mentioned, any citizen, on whom the right to vote had been or might afterwards be conferred, of his right to exercise such franchise by future legislation. There was nothing in the Amendment which purported to affect any legislation passed and in operation before it took effect. If a State should voluntarily amend its constitution so as to permit negroes to vote, such right could not afterwards be taken from them; but further than this the Amendment was not operative.[3]

The case was decided in favor of the contestee on the ground that the negroes who had been refused registration did not have the necessary residence qualification. Justice Brewer, later of the Supreme Bench, in delivering the opinion of the court, negatived the contention of counsel for the contestee, intimating that the Amendment applied to laws or constitutional provisions enacted before its adoption. Yet, speaking of the Amendment, he said: "It operates no further than to strike the word 'white' from the State constitution. Its object and effect were to place the colored man in the matter of suffrage on the same basis with the white. It does not give him the right to vote independent

[2] 7 Kan. 50.

[3] This argument was later urged with much plausibility by Judge Albion W. Tourgee. See the Forum for March, 1890, pp. 78–91.

of the restrictions and qualifications imposed by the State constitution upon the white man."

The same attitude toward the Amendment was taken by the Supreme Court of Oregon in the contested election case of Wood vs. Fitzgerald,[4] which arose out of an election held in that State on June 6, 1870, for a representative in Congress and for state officers. One of the questions involved was whether the votes of two negroes should remain as cast. It was argued that they should be thrown out because the state constitution confined voting to white men. The court held, however, that the effect of the Amendment was to deprive of all legal force and efficacy the provisions of the state constitution restricting the exercise of the suffrage to white persons, thus leaving the negroes free to exercise the franchise upon the same conditions as white men.

Another case growing out of the same election was that of McKay vs. Campbell,[5] which arose under the second section of the Act of May 31, 1870, and was decided in September of that year by the United States Circuit Court for the District of Oregon. McKay, who was a half-breed Indian, offered to register, but Campbell, the registrar, refused to allow him to do so. McKay filed a complaint to this effect, but did not allege that the refusal of the registrar was on account of his race or color. Campbell demurred, alleging that the bill did not sustain a sufficient cause of action. The court, in sustaining the demurrer, said: "The Amendment does not take away the power of the several States to deny the right of citizens to vote on any other account than those mentioned therein. Notwithstanding the Amendment, any State may deny that right on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, etc."[6] After pointing out that the complaint was silent as to the reason of the defendant's refusal to register the plaintiff, the court con-

[4] 3 Ore. 568.
[5] 1 Saw. 374.
[6] The same doctrine was laid down by the Supreme Court of California in the case of Van Valkenburg vs. Brown, 43 Cal. 43.

tinued, "It may have been for some other reason than on account of his race, etc., and then the plaintiff's remedy, if any, would be found under the State law and in the State tribunals." To sum up, the court held that, in order to maintain the action, it was necessary to prove on trial (*a*) that the plaintiff was otherwise qualified to vote, (*b*) that the defendant refused to furnish the plaintiff an opportunity to become qualified to vote, and (*c*) that such refusal was on account of the race, color, or previous condition of the plaintiff.

The above cases, decided, with one exception, in the state courts, exhibit a comparatively strict construction of the Amendment. They show no disposition to construe that article as depriving the States of any more of their former control over the suffrage than the letter of the Amendment rendered necessary. The two leading principles which they lay down are (*a*) the Amendment does not confer the right to vote upon any one, which right, as far as that article is concerned, is still derived from the States, and (*b*) in order to secure a conviction for a violation of the Amendment, it must be shown with a reasonable degree of certainty that the act of discrimination complained of was on account of the race, color, or previous condition of the person discriminated against. In these respects they foreshadow positions later assumed by the Supreme Court of the United States.

In contrast to the above were a number of cases decided in the lower federal courts between 1870 and 1876. Typical among these was the case of United States vs. Given,[7] decided in 1873 in the Circuit Court for the District of Delaware. Under the laws of that State, the names of those who had paid certain taxes were furnished to the judges of election, and no one was allowed to vote whose name was not on the list. Given, a state tax collector, was indicted and convicted in the Circuit Court under the second section of the Act of May 31, 1870, for having failed to return the names of certain negroes as having paid their taxes, and thus prevented them from voting.

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[7] Fed. Cas. Nos. 15210 and 15211.

In its opinion the court took the position that the prohibition in the Constitution against the denial of a right by the States at the same time conceded the grant of the right; for such prohibition would be an absurdity if the grant were not admitted, since otherwise there would be no subject-matter for the denial or prohibition to work upon.

In upholding the section of the Act under which the indictment was framed, the court said: "Of what value is the constitutional provision unless it means that Congress may interfere when a State passes no unfriendly act, but neglects to impose penalties upon its election officers for making discriminations on account of race or color? If by failure to pass such laws as harmonize with and aid in making available and secure to all citizens the right to vote, a practical denial or abridgement of that right is effected, Congress . . . has full power under the Amendment to remove this evil and to select such means as it may deem appropriate to that end."

A step further was taken by the court when, in construing the first and second sections of the Amendment together, it declared that to consider the second section merely as a safeguard against national or state enactments, or as a protection against ministerial or judicial acts of state governments or of state officers acting in the line of their duty prescribed by a State, was to make superfluous and unmeaning all that was accomplished by the first section. If the enjoyment of the right secured by the Amendment was endangered from any other cause than a denial or abridgement by the general Government or by the several States, that danger was a proper subject-matter for Congress to legislate against. The Amendment was manifestly intended to secure the right guaranteed by it against infringement from any quarter, whether from the acts of private persons or of ministerial officers.

The position taken by the court in the Given case in regard to the sufficiency of the Amendment to cover the acts of private individuals was entirely obiter, but this point was

directly presented for adjudication in the case of United States vs. Crosby et al.,[8] decided in 1871 in the Circuit Court for the District of South Carolina. Crosby and others were indicted and convicted for forming, on their private responsibility and contrary to section six of the Act of 1870, a conspiracy to intimidate negroes from voting. In its opinion the court said, "Congress may have found it difficult to devise a method by which to punish a State which by law made a distinction on account of race or color, and may have thought that legislation most likely to secure the end in view which punished the individual citizen who acted by virtue of a State law or upon his individual responsibility."

The same position was taken by Justice Bradley in the case of United States vs. Cruikshank et al.,[9] which came up in 1874 in the Circuit Court for the District of Louisiana. Cruikshank and one hundred others were indicted for a conspiracy contrary to section six of the Act of 1870. In two of the counts the intent charged was to put the parties named in great fear of bodily harm because they had voted at divers elections held in the State of Louisiana. There was nothing to show, however, that the elections voted at were any other than state elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. A motion was entered for arrest of judgment, and Justice Bradley, in delivering the opinion in favor of the motion, among other things said: "The real difficulty in the present case is to determine whether the Amendment has given Congress any power to legislate except to furnish redress in cases where the States violate the Amendment. Considering that the Amendment, notwithstanding its negative form, substantially guarantees the equal right to vote to citizens of every race and color, I am inclined to the opinion that Congress has the power to secure that right not only as against the unfriendly operation of State laws, but against outrage, violence, and combinations on the part of individuals irrespective of State laws."

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[8] 1 Hughes, 448.
[9] 1 Woods, 308.

Although the parties indicted in this case were acting on their individual responsibility without color of state authority, yet the case is not a precedent for the proposition that the Amendment applies to the wrongful acts of private individuals.[10] The weight of this dictum is due to the learning of the judge delivering it. The point upon which the case really turned, and the ground of Bradley's opinion in favor of the motion, was that the indictment was defective in all its counts because it did not allege that the acts complained of were done on account of the race of the complainants. The law on the subject he conceived to be that when any atrocity was committed, by private combinations, or even by private outrage or intimidation, which was due to the race of the party injured, it might be punished by the laws and in the courts of the United States; but that any outrages, whether against the colored race or the white race, which did not flow from this cause, were within the sole jurisdiction of the States.

The order arresting the judgment in conformity with the opinion of Justice Bradley was affirmed by the Federal Supreme Court,[11] where the case was carried on writ of error and certificate of division. The Supreme Court neither affirmed nor denied Bradley's opinion that the Amendment inhibits the acts of private individuals, nor did it go so far as to say that any outrage, if committed on account of the race of the person injured, came within the jurisdiction of the United States. But it did base its decision, in affirmance of that of Bradley, on the ground that it had not been shown that the outrages in question had been committed on account of race. "As it does not appear in the counts," said Waite, C. J., "that the intent was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that there was an intent to interfere with any right granted or secured by the Constitution of the United States."

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[10] Although it has been used as such in United States vs. Lackey, 99 Fed. 952.

[11] In United States vs. Cruikshank, 92 U. S. 542.

Summarizing the results of the decisions up to this point, we find that the principle first laid down in McKay vs. Campbell, to the effect that an essential ingredient in the offense prohibited by the Amendment is discrimination on account of race, etc., has not been denied in any case, and has been explicitly upheld in others. In the second place, the doctrine embodied in the early cases, that the Amendment does not confer the right to vote upon any one, though not absolutely denied, has been qualified to the extent of holding that the prohibition of the denial of the right is a virtual grant of the right. The third principle thus far established, partly as a corollary from the qualification introduced into the second, is that the power of Congress under the Amendment reaches to the punishment of private individuals who infringe the right secured by the Amendment.

The last named principle rested, up to this point, on at least one direct decision[12] and several more or less weighty dicta, and had not been explicitly denied by any litigated case. In the cases in which this principle was laid down the indictments were framed under sections in the Act of Congress which placed this interpretation upon the Amendment, and hence the courts were forced either to accept this interpretation or to declare the Act of Congress to that extent not to be appropriate legislation under the Amendment. Yet the animus of these opinions does not appear to have been solely a desire to avoid setting aside the Act of Congress, for, had such been the case, unnecessary dicta would not have been uttered. Furthermore, although in the Given case[13] it was implied that the failure of a State to pass laws which would secure the free exercise of the right conferred by the Amendment constitutes a virtual denial of that right by the State, yet even this does not seem to have been the ground upon which these opinions were rendered. It would be unreasonable to presume that these courts considered the isolated act of a private individual as the act of the State, unless it were as a sort of legal fiction to give a color of

[12] United States vs. Crosby, 1 Hughes, 448.
[13] Above, p. 100.

support to their position. But the real reason for their position was practical rather than legal. It was admitted that in its outward form the Amendment laid a prohibition upon the acts of the national and state governments, and not upon those of private individuals. But substance must not be sacrificed to form. The spirit and manifest purpose of the Amendment, as indicated by the history of the times in which it was proposed and adopted, was to secure to the negro the right to vote upon an equal basis with the white man. If the courts were impotent to construe it in the light of this purpose, and to protect the right against infringement from any quarter, then the right would become incapable of enjoyment, and the national will as expressed in the Amendment would be entirely frustrated. Moreover, the enforcement section must be construed as conveying some effective power, and since the only efficient means of enforcing the Amendment would be by punishing individuals, whether acting under state authority or suo motu, for violating the right secured thereby, Congress must be construed to have the power of selecting this means. These were the considerations, based primarily upon practical grounds and secondarily upon a broad construction of the implied powers vested by the Constitution in the National Government, which induced the lower federal courts to expand the Amendment beyond the scope which its letter and prima facie meaning would seem to warrant.

Thus matters stood when, in 1876, the Supreme Court was for the first time called upon to place an authoritative interpretation upon the Amendment. That court had already laid down in the case of Minor vs. Happersett[14] the doctrine that the Constitution does not confer the right of suffrage upon any one, and that the United States has no voters of its own creation in the States. This declaration was too broad if intended to apply to all the provisions of the Constitution,[15] but, as regards the Fifteenth Amendment, it has never been modified. It foreshadowed the position taken

[14] 21 Wall. 162.
[15] See Ex parte Yarbrough, 110 U. S. 651.

by the court in the case of United States vs. Reese,[16] which is the leading case upon the interpretation of the Amendment.

Reese was one of the inspectors of a municipal election held in the State of Kentucky, and was indicted under sections three and four of the Act of May 31, 1870, for refusing to receive and count at such election the vote of one Garner, a citizen of the United States of African descent. The case came to the Supreme Court on certificate of division between the judges of the Circuit Court for the District of Kentucky. In the Supreme Court, the United States expressly waived the consideration of all claims not arising out of the Fifteenth Amendment and the act passed for its enforcement. In delivering the opinion of the court, Waite, C. J., said: "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, etc. Before its adoption, this could be done. . . . Now it cannot. If citizens of one race having certain qualifications are permitted to vote, those of another having the same qualifications must be. . . . It follows that the Amendment has invested the citizen of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."

The question then arose whether, in the light of these distinctions, the right claimed to have been acquired under the Enforcement Act was within the constitutional power of Congress, under the Amendment, to protect by penal enactments. In considering this question, the court said: "The power of Congress to legislate at all upon the subject of voting at State elections rests upon this Amendment. It cannot be contended that the Amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only

[16] 92 U. S. 214.

when the wrongful refusal at such an election is on account of race, etc., that Congress can interfere and provide for its punishment."

Applying this principle to the sections of the act under which the indictment was framed, the court expressed the opinion that these sections were broad enough to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise, and were not confined in their operation to unlawful discrimination on account of race, etc. For this reason, the court decided that these sections were beyond the authority conferred on Congress by the Amendment, and hence an indictment under them could not be sustained.

In deciding this case the court was evidently animated with the desire to preserve a just balance between the federal and state governments, and to annul any encroachments which may have been made by one upon the other. In marking off the proper sphere of each, the court intimated that, as far as the Amendment was concerned, the right to vote was still derived from, and within the protection of, the States. This view was even more emphatically stated by the court in the Cruikshank case[17] in the following language: "The right of suffrage is not a necessary attribute of national citizenship; but exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

The Reese case is important, not so much for establishing new doctrines as for placing the authoritative approval of the Supreme Court upon doctrines already in process of becoming established. It reaffirmed two of the principles which had emerged with more or less distinctness from previous decisions, namely, (*a*) that the Amendment does

[17] 92 U. S. 542, decided the same day as the Reese case.

not confer the right to vote upon any one, and (*b*) that the discrimination prohibited by the Amendment is that which is due solely to race, etc.

The third principle which had received support in the lower federal courts, viz., that the Amendment inhibits the wrongful acts of private individuals as well as of the national and state governments, was neither affirmed nor denied in the Reese case. Since the defendant in this case was an officer of the State, and the acts complained of were performed in his official capacity, the question of the sufficiency of the Amendment to cover the acts of private individuals was not before the court, and the decision did not involve that point.[18] In this particular, therefore, the law remained to all intents and purposes as it had been laid down in the United States vs. Crosby.

In the case of ex parte Yarbrough,[19] decided in 1884, the principle laid down in the Reese case that the Amendment does not confer the right of suffrage upon any one was apparently somewhat qualified. In the Yarbrough case the court denied a petition for a writ of habeas corpus for the release of several prisoners convicted for conspiracy to prevent a person of African descent from voting at an election for a member of Congress. Justice Miller, delivering the opinion of the court, said: " While it is true, as said in the Reese case, that the Fifteenth Amendment gave no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding States had not removed from their constitutions the words ' white man ' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, it

[18] The intimation by Justice Brewer in James vs. Bowman, 190 U. S. 127, that the Reese case is a precedent for the position that the Amendment does not apply to private individuals is therefore unwarranted.

[19] 110 U. S. 651.

annulled the discriminating word white, and thus left him in the enjoyment of the same rights as white persons.[20] In such cases the Amendment does, proprio vigore, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

This result, however, does not arise from the essential nature of the Amendment, but from its operation upon an adventitious set of circumstances. The investment of the negroes with the suffrage was not the necessary effect of the elimination of the discriminating word "white" from a state constitution, because the negroes would not then have been entitled to vote unless they had been able to measure up to the other qualifications required by the State in the case of white men. And even had they been able to do so, they would have derived the right to vote from the state law as modified by the Amendment.[21] As far as the Amendment is concerned, the States might abolish the suffrage altogether. It remains fundamentally true, therefore, that the Amendment does not confer the right to vote upon any one.

Although, in the Yarbrough case, the persons who had been convicted for conspiring to prevent negroes from voting were acting without color of state authority, yet it does not follow that the court held in this case that the Amendment prohibits wrongful acts of private individuals. It is important to note that the election at which the negro in question was alleged to have been prevented from voting was an election for a member of Congress. The court expressed the view that the right to vote at such an election was a right derived from the Federal Constitution, and hence Congress might punish combinations of private persons who should prevent lawful voters from voting at such an election on account of their race, etc. The power

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[20] Following Neal vs. Delaware, 103 U. S. 370.

[21] Except in congressional elections, when the right to vote would have been derived from the old constitution. In McPherson vs. Blacker, 146 U. S. 37, it was held that the Amendment does not secure the right to vote for presidential electors.

of Congress in this particular, however, would not be derived from the enforcement section of the Fifteenth Amendment,[22] but from the general control of the national legislature over congressional elections, and from the implied power of the National Government to safeguard any right derived from the Constitution, the exercise of which is essential to its existence and healthy organization.

In the case of the United States vs. Amsden[23] it was for the first time directly decided that the Amendment does not lay a prohibition upon private individuals. Amsden, a private citizen, was indicted under section 5507, R. S.,[24] for preventing a colored man, by threats of violence, from voting at a purely state election. No law of the State was complained of, and no state officer was charged with wrong-doing. The court sustained the motion to quash the indictment on the ground that the section under which it was framed was not warranted by the Amendment for two reasons: (*a*) it undertook to restrain the acts of private individuals; and (*b*) it was not confined to the prohibition of discrimination on account of race, etc.

In the cases of United States vs. Harris[25] and Logan vs. United States[26] casual intimations were thrown out by the Supreme Court that the Amendment does not lay a prohibition upon private persons. But in neither of these was the Amendment directly before the court for adjudication. Strictly speaking, therefore, the law upon this point remained in the somewhat doubtful condition in which it had been left by the Amsden case, which was the only direct decision in conflict with the previous doctrine of the Crosby case and with the dicta in the Given and Cruikshank cases.[27] This condition of affairs continued until 1900, and was the theoretical justification for the decision in the case of

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[22] Per contra, see 1 Foster on the Constitution, 330.

[23] 6 Fed. 819. Decided in 1881, in the United States District Court, District of Indiana.

[24] Corresponding to section 5 of Act of 1870.

[25] 106 U. S. 629.

[26] 144 U. S. 263.

[27] Above, pp. 101, 102.

United States vs. Lackey,[28] handed down in that year by the Federal District Court for the District of Kentucky.

Lackey was indicted under section 5507, R. S., for preventing certain persons of the African race from voting at an election at which state officers only were chosen. It was charged that the alleged offense was committed on account of the race of the negroes, but it was not charged that it was done under color of any state law or state authority. The court held that, as a matter of fact, the Amendment did confer on the negro the right to vote, and that Congress could enforce that right against the hostile acts of individuals, whether acting under state authority, or on their own responsibility. Section 5507 was adapted to this end, and was therefore appropriate legislation for the enforcement of the Amendment. In taking this position, the court relied on the dictum of Bradley in the Cruikshank case,[29] and refused to follow the Amsden case on the ground that it did not appear to have been ruled according to the views of the Supreme Court in the Yarbrough and Reese cases. "Indeed," said the court, "if the views expressed in the Amsden case are to prevail, the Fifteenth Amendment is far less important and far less adapted to the objects its framers had in view, than might have been inferred from the tremendous struggle for its adoption, and the matter had probably as well have been left with the States altogether."

The decision in the Lackey case was ruled more in accordance with what were conceived to be the ends of justice than with the weight of persuasive, if not imperative, authority. Even apart from the Amsden case, light upon the construction of the Fifteenth Amendment might have been drawn from the decisions of the courts in regard to the analogous prohibitions of the Fourteenth Amendment. In a long line of cases it had been held that these prohibitions operate as restraints upon the action of States

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[28] 99 Fed. 952.
[29] Above, p. 103.

and not of private individuals,[30] and it was reasonable to suppose that these decisions must control the construction of the Fifteenth Amendment.

The case of United States vs. Lackey was immediately overruled by the Circuit Court of Appeals in the case of Lackey vs. United States.[31] In this the court followed the Amsden case, and declared section 5507, R. S., unconstitutional, because it was so broad in its terms as to make punishable an act of a private person committed at a purely state election, if committed against a negro voter, although it had no relation to the race, etc., of such voter.

In the case of Karem vs. United States[32] the two principles were clearly laid down that the Amendment relates (*a*) solely to state action, and (*b*) solely to discrimination on account of race, etc. It follows from these principles that appropriate legislation for enforcing the Amendment must be directed to state action in some form, by which otherwise qualified voters are denied the elective franchise on account of race, etc. Legislation directed to the mere lawless acts of individuals at state elections, even though such acts be based on race or color, would enter the domain of the police power of the State. The power of Congress under the Amendment is limited to legislation anticipatory or corrective of the discriminatory conduct of those exercising state authority. This power is sufficiently ample to provide for the punishment of state officers who, even at purely state elections, refuse to receive and count the votes of otherwise qualified voters on account of their race, etc.

The controversy as to the sufficiency of the Amendment to inhibit the acts of private persons was finally set at rest by the Supreme Court in the case of James vs. Bowman,[33]

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[30] See, e. g., United States vs. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 3; Logan vs. United States, 144 U. S. 263; Virginia vs. Rives, 100 U. S. 313; Le Grand vs. United States, 12 Fed. 577.

[31] 107 Fed. 114.

[32] 121 Fed. 250. Decided in 1903 by the Circuit Court of Appeals for the Sixth Circuit.

[33] 190 U. S. 127.

decided in 1903. This was the first case in which that court directly decided that such an extension of the Amendment cannot be sustained.

The case came up on appeal from the District Court for one of the Kentucky districts. Bowman, a private citizen, had been indicted under section 5507, R. S., for having prevented certain negroes, by means of bribery, from voting at an election for a member of Congress. The indictment charged no wrong done by any one acting under the authority of the State of Kentucky, nor that the bribery was on account of race, etc. Bowman sued out a writ of habeas corpus on the ground of the unconstitutionality of section 5507. The district judge granted the writ, following reluctantly the decision in Lackey vs. United States. From this judgment the Government appealed, in the name of James, the district marshal. The Supreme Court affirmed the judgment of the District Court, holding section 5507 not to be appropriate legislation for the enforcement of the Amendment, because (*a*) it was not confined to the interdiction of state action, and (*b*) it did not relate solely to wrongful discrimination on account of race, etc. Justice Brewer, delivering the opinion of the court, held that the principles of interpretation applicable to the first section of the Fourteenth Amendment are equally applicable to the construction of the Fifteenth Amendment. The latter article, he said, "relates solely to action by the United States or by any State and does not contemplate wrongful individual acts." Hence, "a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives."[34]

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[34] The court admitted that Congress had general power over congressional elections, but declared that the statute in question was not enacted in pursuance of such power, but was an attempt to exercise power supposed to be conferred by the Fifteenth Amendment in respect to all elections, state and federal.

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The final determination of the question involved in this phase of the Amendment was delayed, not because of the difficulty of the law upon the subject, but because some courts apprehended that unless the Amendment were extended so as to cover individual acts, it would be largely shorn of its efficiency in securing the right of the negro to vote. As a mere question of law, such an extension is unwarranted, even apart from the explicit language of the Amendment. No agencies except the state and federal governments are capable of denying the right to vote, because they alone have the power to confer it. Private individuals can interfere with the enjoyment or exercise of the right to vote, but are impotent to take away the right itself.

Having established the principle that the Amendment can be violated only by the State or by the United States, the further question remains as to when any particular discrimination is imputable to these agencies. This question has not been worked out with any fullness in the decisions on the Fifteenth Amendment, and this leaves the matter open to theorization, except in so far as its determination is controlled by decisions in analogous cases. We need consider only two cases, which will be seen to be merely two phases of the same case, viz., (*a*) when the law under which a state officer commits a discriminatory act is in conflict with the Amendment, and (*b*) when such act is committed by a state officer without color of authority from any state law.

It has been held that the issuance of a warrant by a state officer under a state law which authorized him to do so, but which, in this respect, was void for conflict with the Fourteenth Amendment, was an act of the State.[35] The state act was not the enactment of the void law, but the issuance of the warrant. According to the theory of an unconstitutional law, such a supposed law is not a law at all, has no validity or efficacy whatever, and hence can confer no authority upon any one. What a state legislature cannot constitutionally do, in contemplation of the law it has not done.[36]

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[35] In re Lee Tong, 18 Fed. 255.
[36] Poindexter vs. Greenhow, 114 U. S. 270.

A State, therefore, cannot by law authorize any of its officers to violate the Amendment. The act of violating the Amendment on the part of the State does not take place when the legislature assumes to pass an act in conflict with the Amendment, but when an officer of the State undertakes to enforce such a void law.

Furthermore, if a state court, acting within its jurisdiction, holds valid an act of the state legislature which conflicts with the Amendment, or interprets a valid act erroneously so as to conflict therewith, such ruling, in contemplation of law, is to be viewed as a void law, i. e., not as an act of the State and therefore not in violation of the Amendment.[37] But if an officer of the State undertakes to execute the judgment of the state court under the supposed authorization given by its erroneous decision, his act is the act of the State and violates the constitutional prohibition. Hence the Amendment is not violated either by the unconstitutional laws of a state legislature or by the erroneous rulings of the state courts, but only by the actual enforcement by a state officer of such unauthorized laws or rulings.

It might be supposed, by parity of reasoning, that if an executive officer of a State acts ultra vires, either under the supposed authorization of a void law or of an erroneous decision, or without color of law, his act is not to be considered the act of the State, and hence not a violation of the Amendment.[38] Some color also is given to such a position by a ruling of the Supreme Court to the effect that a state executive officer acting under the supposed authorization of an unconstitutional law is stripped of his official char-

[37] Cf. Arrowsmith vs. Harmoning, 118 U. S. 194; but see, per contra, Scott vs. McNeal, 154 U. S. 34.

[38] It must not be overlooked that state officers sometimes exercise both judicial and executive functions. Thus a judge of election passes on a voter's qualifications and then decides to receive or to reject his vote. But this is merely a case where a subordinate tribunal executes its own decisions. The actual coalescence of two functions in one person does not prevent their separation in principle. The voter is not injured by an erroneous decision of the election judge, but by the conduct of the judge in pursuance of his decision.

acter, and acts in his private capacity.[39] If such a position could be maintained in regard to the Fifteenth Amendment, that article would indeed be rendered a mere brutum fulmen, for, if our reasoning is valid, it could not then be violated by either the legislative, the judicial, or the executive branch of a state government. But at this point the doctrine of ultra vires, as far as it is applicable to the Amendment, breaks down. In as far as that article is concerned, the theory of an unconstitutional law cannot properly be extended so as to apply to the unauthorized act of an administrative officer. The Amendment has built around every citizen of the United States a legal exemption from the prohibited discrimination on the part of all state instrumentalities officially employed in the execution of the law at the point where the individual rights of the citizen are touched.[40] Inspectors of election exercise the whole power of the State in creating its actual government by the reception of votes and the declaration of the results of the votes. If they receive illegal votes or reject legal ones, the act is in each case the act of the State, and the result must be abided by until and unless corrected by the courts. By such acts the State invades the domain of political liberty built around the citizen by the Amendment. In general, individual rights are not affected by the laws on the statute books or by the decisions of the courts unless and until they are enforced. But when an administrative officer of a State, acting by virtue of public position under that State, undertakes to enforce a void law or an erroneous decision, or discriminates without color of law against a lawful voter on the prohibited grounds, his act is the act of the State, and violates the right secured to the citizen by the Amendment.[41]

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[39] Poindexter vs. Greenhow, 114 U. S. 270, and see separate opinion of Field and Clifford, JJ., in Virginia vs. Rives, 100 U. S. 313. But compare, per contra, Ex parte Virginia, 100 U. S. 339; C. B. & Q. R. R. Co. vs. Chicago, 166 U. S. 226; and Pacific Imp. Co. vs. Ellert, 64 Fed. 430.

[40] Cf. N. C. & St. L. Ry. vs. Taylor et al., 86 Fed. 184.

[41] Unless such administrative acts can be and are fully corrected by the state courts. Cf. Virginia vs. Rives, 100 U. S. 313.

The principle which, by the decision of the Supreme Court in James vs. Bowman,[42] became an orthodox canon of the interpretation of the Amendment, viz., that that article lays a prohibition upon state action in some form and not upon the action of private individuals, has become less important since 1890. That date may be adopted for convenience as marking the division between the era of violence and private intimidation and the era of legal disfranchisement. The feature of the Amendment which is now perhaps of more importance than any other is that the discrimination which is thereby prohibited is that which is due solely to race, etc. This doctrine, as we have seen, was early recognized by the courts as one of the leading principles in the interpretation of the Amendment. The principle itself is settled practically beyond doubt, but, in applying it to concrete cases, the question arises as to when any particular discrimination is on account of race, etc. This question has not yet been fully worked out by the courts.

In the early case of McKay vs. Campbell,[43] the court, after laying down the general principle, said: "It may be said with much probability that disingenuous judges of elections who are . . . prejudiced against the Amendment . . . may refuse to allow a citizen to qualify himself to vote, ostensibly for some reason not within the purview of the Act, but really and in fact on account of his race. But this is a question of fact, and, if the evidence is sufficient, the jury will be bound to disregard the pretences of the defendant and find according to what appears to have been the fact. Besides," the court added, "to prevent a failure of justice on this account it may be necessary and proper to hold in this class of cases . . . that slight proof on the part of the plaintiff as to the reason of the defendant's refusal is sufficient to throw the burden of proof in this respect upon the latter."

In the case of United States vs. Cruikshank,[44] in which negroes had been prevented by violence from voting, Waite,

[42] 190 U. S. 127.
[43] 1 Saw. 374.
[44] 92 U. S. 542.

C. J., said: "We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively and not inferentially. The defect here is not in form, but in substance."

In both of these cases the lack of proof that race was the cause of the discrimination was the ground upon which the decision directly turned. The difficulty which will doubtless be experienced by the courts in determining the amount of proof necessary to convict for violation of the Amendment, involving an act of discrimination complained of on account of race, etc., will arise in part from the conflict of two considerations. The first is the common-law principle that a criminal statute must be construed strictly. The second is the consideration that, on account of the difficulty of proving the motive in such cases, the benefit of doubt is to be given to the injured party. Whether these conflicting considerations shall become fully harmonized or not, the general principle holds good that the Amendment is not violated unless discrimination on the specified accounts is shown to the satisfaction of the court. Unless this is shown the discrimination is presumably based on other grounds, and hence remains within the sole jurisdiction of the State.

The inference is sometimes made that when persons are prevented from voting and those persons are negroes, therefore the exclusion is on account of race, etc. For example, Mr. J. C. Rose adduces the fact that in 1900 there were in South Carolina and Mississippi 350,000 adult male negroes, and that the aggregate number of votes returned in both States for the Roosevelt and Fairbanks electoral ticket was only about 5000. From these facts he deduces this conclusion: "It is clear, therefore, that it has in fact been possible for the white inhabitants of some of the States . . . so to abridge the right of suffrage *on the ground of race and color* as to deny that right substantially to all negroes."[45]

[45] "Negro Suffrage: The Constitutional Point of View." American Political Science Review. Vol. 1, p. 20. Italics my own.

As a matter of fact that may be true, but as a legal proposition it is a non sequitur. It is not only unwarranted to presume that because certain persons are excluded from the suffrage and those persons are negroes, therefore such exclusion is on the ground of race and color, but such a state of facts may, with equal plausibility, be explained on another hypothesis. It is hardly probable that any qualification that a State may set up will bear equally on both races. If there should be any qualification that all the whites could reach but no negro could, and that qualification did not involve some characteristic unmistakably distinguishing, or inseparable from, either race, then the negroes would not be excluded on account of their race. Now Mr. Rose's argument is based upon two conflicting assumptions, (*a*) that there is no qualification that would admit practically all the whites and exclude practically all the blacks that would not be based on race or color, and (*b*) that no negroes at the time and place mentioned voted the Democratic ticket and practically no white men voted the Republican ticket. It is in the mutual repugnance of these two assumptions that his argument, viewed as a legal proposition, breaks down. If we accept his second assumption as a working hypothesis, then the respective party proclivities of white and black men in the State constitute a line of cleavage between them almost, if not quite, as distinct as that of race or color. That a discrimination against negroes may as a matter of fact be based on such a consideration has been recognized by the courts.

In the case of United States vs. Cruikshank,[46] Bradley, J., sitting on circuit, said: "There may be a conspiracy to prevent persons from voting having no reference to discrimination on account of race or color. It may include whites as well as blacks, or may be confined altogether to the latter. It may have reference to the particular politics of the latter. All such conspiracies are amenable to the State law alone. To bring them within the Amendment, they must have for

[46] 1 Woods, 308.

motive the race, etc., of the party whose right is assailed."[47]

This opinion of the learned justice, which was not a casual remark, but was an appreciable influence in the decision of the case, is based upon a proposition which is the opposite of Mr. Rose's first assumption, viz., that there may be a qualification or ground of discrimination among potential voters, not based on race or color, which would admit all the whites and exclude all the blacks. Hence, according to this view, his first assumption is untenable, and the Amendment is not necessarily violated, even though none but negroes are discriminated against. It is true that if the discrimination is on account of some inseparable characteristic of the negro race, which distinguishes that race unmistakably from the white race, such discrimination is on account of race. But propensity to vote the ticket of a particular party is not such a characteristic. Hence, according to the hypothesis which we are now pursuing, if practically all the negroes and practically no white men in a particular State are prevented from voting, the presumption may be quite as strong that the basis of discrimination is party proclivity as that it is race, color, or previous condition of servitude. If such is the case, the right secured to the citizen by the Amendment is not infringed.

The chief application at the present time of the principle that the discrimination prohibited by the Amendment is that which is due solely to race, etc., is in connection with the so-called disfranchising constitutions which have been put into operation by several Southern States, beginning with Mississippi in 1890. The first case that reached the Supreme Court, however, arose in 1895 out of the attempt of South Carolina to provide for calling a convention to revise the constitution. The law under which the registration preliminary to the election of delegates to the convention was held was so drawn as to exclude ignorant, roving, and improvident persons. Mills, a negro, tried to register under

[47] In James vs. Bowman, 190 U. S. 127, the court intimated that the negroes prevented from voting were so prevented, not because they were colored men, but because they were voters.

this system, but was rejected by Green, the registrar. He brought suit against Green, and secured an injunction from the Federal Circuit Court forbidding him to perform the acts complained of. The injunction was issued upon the ground that the sole intention of the legislators in passing the law was to disfranchise as many Africans as possible, and at the same time to interfere with as few white voters as possible. The court held that this infringed the constitutional right of the complainant.[48]

The case was immediately carried to the Circuit Court of Appeals, where the injunction was dissolved. Fuller, C. J., ordered that the bill be dismissed on the ground that equity has no jurisdiction in matters of a political nature.[49] Justice Hughes, concurring, rested his opinion upon "the impolicy of interference by the courts in questions which will result in dragging them constantly into the arena of party politics."[50] The case was thereupon carried up on appeal to the Supreme Court. But in the meantime the election had been held, the convention had met, and had entered upon the discharge of its duties. Consequently the Supreme Court dismissed the appeal on the ground that no relief within the scope of the bill could then be granted, there being no subject-matter upon which the judgment of the court could operate.[51] In this way the court avoided passing upon the merits of the law.

In 1890 Mississippi adopted a constitution by which it was required that all voters should have resided one year in the election district, should never have been convicted of certain specified crimes, and should have paid all taxes for two years back, and be able to produce satisfactory evidence of having done so.[52] Beginning with 1892, in addition to the foregoing requirements each voter must be able to read any section of the Constitution, or to understand the same when read to him, or to give a reasonable interpretation thereof.[53]

[48] Mills vs. Green, 67 Fed. 818.
[49] Green vs. Mills, 69 Fed. 852.
[50] Ibid.
[51] 159 U. S. 651.
[52] Section No. 241.
[53] Section No. 244.

There is nothing on the face of these provisions which discriminates against negroes as such. The only objection that could be raised is the wide discretion conferred upon election officers in administering the understanding clause.

In 1898 this constitution came before the Federal Supreme Court for adjudication.[54] Williams, a negro, was indicted for murder in a lower court by a grand jury composed entirely of white men. He moved to quash the indictment on the ground that the law under which the jury was organized was unconstitutional. The trial court denied the motion, and on appeal to the Supreme Court of the State the judgment was affirmed. The case was then carried up on writ of error to the Federal Supreme Court. The plaintiff in error contended that the laws of Mississippi required that in order to be a juror one must be an elector, and that the franchise provisions of the constitution were a scheme on the part of the white people to discriminate against negroes on account of their race. He claimed, however, not that either the constitution or the laws of the State discriminated in terms against the negro race, but that such discrimination was effected by the powers vested in administrative officers. But the Supreme Court refused to interfere, holding that the state constitution and laws did not on their face discriminate between the races, and that "it had not been shown that their actual administration was evil, only that evil was possible under them."

This disposition of the case seems at first sight to conflict with rules of interpretation laid down by the court in Henderson vs. Mayor of New York[55] and in Yick Wo vs. Hopkins.[56] In the latter case, however, it was shown to the satisfaction of the court that the ordinances complained of were not only unconstitutional on their face but were also administered so as to discriminate unjustly between citizens. In the Williams case this was not shown. Williams merely alleged as a general proposition that these provisions had

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[54] Williams vs. Mississippi, 170 U. S. 213.
[55] 92 U. S. 259.
[56] 118 U. S. 356.

been used to discriminate against negroes. He did not adduce any particular act of discrimination that occurred at a definite time and place. Hence the allegation was insufficient, and the decision was clearly correct, since, in general, courts will not undertake to redress evils unless actual evils are shown.

In 1901 Virginia framed a new constitution which temporarily confined the suffrage to veterans and their sons, taxpayers, and those who were able to read and explain, or to understand and give a reasonable explanation of, any section of the Constitution.[57] Under this system an election was held the following year for members of Congress. Actions were then commenced in the Federal Circuit Court for a writ of prohibition and for an injunction to restrain the State Board of Canvassers from canvassing the votes cast at this election. The court dismissed both the bill and the petition, and the cases were then carried up to the Supreme Court on appeal and writ of error. In the meantime the canvass was made, certificates of election were issued, and the persons elected were admitted to the House of Representatives. The Supreme Court, therefore, following Mills vs. Green,[58] dismissed both causes on the ground that the thing sought to be prohibited had been done, and could not be undone by any order of the court.[59] The court intimated, without actually saying it, that the most feasible means of correcting such elections, if illegal, would be through the power of the House of Representatives to judge of the qualifications of its members.

Of the constitutions recently put into operation in the South which have thus far been brought to the notice of the Supreme Court, that of Alabama remains to be considered. By the provisions of this constitution, prior to 1903, the right to register was confined to veterans and their descendants, and to persons who were of good character and under-

[57] Art. II, sect. 19.
[58] 159 U. S. 651.
[59] Jones vs. Montague, 194 U. S. 147; Selden vs. Montague, 194 U. S. 154.

stood the duties and obligations of citizenship under a republican form of government.[60] After that date, literary and property requirements came into play, but those who had registered under the temporary plan were entitled to vote for life.[61]

Giles, a negro, was refused registration by the Board of Registrars of Montgomery County. He brought action against the board, both in the state courts and in the Federal Circuit Court. In the state court he petitioned for a writ of mandamus to compel the board to register him, and also sought to recover damages for their refusal to do so. He alleged that the provision of the constitution creating the board and defining their duties was void as repugnant to the Fourteenth and Fifteenth Amendments, and that the board had arbitrarily refused to register him for no other reason than his race or color. The Supreme Court of the State held that the complaint was demurrable, on the ground that if the constitutional provision was void, as plaintiff alleged, the board was without authority to register him, and hence a mandamus would not lie to compel them to do so, nor could their refusal be made a predicate for the recovery of damages.[62]

Giles then carried the case up on writ of error to the Federal Supreme Court. But that court, though expressing its sense of the "gravity of the statements of the complainant charging violation of a constitutional amendment which is part of the supreme law of the land," yet dismissed the writ on the ground that no federal right had been denied by the state court in such wise as to give the Supreme Court the right of review.[63]

Meanwhile Giles had brought a bill in equity in the Federal Circuit Court, alleging that he was entitled to vote under the state constitution, but had been arbitrarily refused registration on account of his color, and praying that the

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[60] Art. VIII, sect. 180.
[61] Art. VIII, sect. 187.
[62] Giles vs. Teasley, 136 Ala. 164.
[63] Giles vs. Teasley, 193 U. S. 146.

franchise provisions of the constitution be declared void, and that the Board of Registrars be required to enroll his name upon the voting lists. The Circuit Court dismissed the bill for want of jurisdiction and want of equity, and an appeal was taken to the Supreme Court.[64] The single question certified to the Supreme Court was as to the jurisdiction of the lower court. As it did not appear upon the record that threatened damage was averred exceeding the required jurisdictional amount of two thousand dollars,[65] it was clearly a case which the Supreme Court should have remanded to the court below without going into its merits.[66] The court, however, waived this consideration, and assumed jurisdiction to go into the question as to whether equitable relief could be furnished in the premises on the ground of the unconstitutionality of the franchise provision. The court decided that such relief could not be granted for three reasons: (*a*) the enforcement of political rights does not come within the cognizance of equity; (*b*) the ground of the complaint involved the illegality of the franchise provisions under which the plaintiff asked to be registered, and to add his name to the lists would make the court a party to an unlawful scheme; and (*c*) the court could not secure an undiscriminating administration of the franchise provisions without directly supervising the election machinery in the State, and this it was not prepared to do. "Apart from damages to the individual," the court added, "relief from a great political wrong, if done . . . by the people of a State and the State itself, must be given by them or by the legislative and political department of the Government of the United States."

The significant points in this case are (*a*) the willingness evinced by the court to go into the merits of the case, when it might, with better law, have avoided doing so, and (*b*) the apparent desire to shift the duty of redressing such wrongs upon the political department of the Government.

[64] Giles vs. Harris, 189 U. S. 475.
[65] 25 Stat. at Large, 433.
[66] See dissenting opinion of Justice Harlan.

So far as Congress has given any indication of its attitude upon the subject, it has intimated that the matter is one for judicial settlement.[67] But the absence of congressional legislation would in any case hamper the efficiency of the courts in securing the practical enforcement of the Amendment. The real reason behind the attitude of both Congress and the courts is the apathetic tone of public opinion, which is the final arbiter of the question. In the technical sense, the Amendment is still a part of the supreme law of the land. But as a phenomenon of the social consciousness, a rule of conduct, no matter how authoritatively promulgated by the nation, if not supported by the force of public opinion, is already in process of repeal.

[67] See H. Rept. No. 1740, 58th Cong., 2d sess., p. 3.

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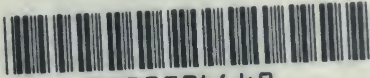

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